# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

J&S ELECTRICAL CONTRACTORS, INC.,

and

Case No. 4-CA-31461

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 269, AFL-CIO

Randy M. Girer, Esq., and Anjall P. Enjeti-Sydow, Esq., for the General Counsel.

Richard T. Aicher, of Trenton, New Jersey for the Charging Party.

Raymond A. Kresge, Esq., and Andrew J. Rolfes, Esq., of Philadelphia, Pennsylvania for the Respondent.

## **DECISION**

## Statement of the Case

ERIC M. FINE, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on January 21 to 24, 2003. The charge was filed by the International Brotherhood of Electrical Workers, Local Union No. 269, AFL-CIO (the Union or Local 269) on July 19, 2002, against J & S Electrical Contractors, Inc. (Respondent). Complaint issued on October 31, alleging Respondent committed several independent violations of Section 8(a)(1) of the Act and that Respondent violated Section 8(a)(1) and (3) of the Act by: refusing to consider for hire applicants Steve Aldrich, Richard Andra, Tom Bates, Michael Hnatkowsky and James Huston; and by issuing a disciplinary warning to and discharging employee Kevin Byrne.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses,<sup>3</sup> and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

<sup>&</sup>lt;sup>1</sup> All dates are in 2002 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> The General Counsel's unopposed motion to correct the transcript, dated April 7, is granted and received into evidence as G.C. Exh. 31.

<sup>&</sup>lt;sup>3</sup> In making the findings herein, I have considered the demeanor of all witnesses, the content of their testimony, and the inherent probabilities of the record. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951).

## I. Jurisdiction

Respondent, a corporation, is an electrical contractor in the construction industry and from its Bensalem, Pennsylvania facility it annually performs services in excess of \$50,000 outside the state of Pennsylvania. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

# II. Alleged Unfair Labor Practices

Scott Schultz is Respondent's owner.<sup>4</sup> In June 2002, Respondent had around 30 employees with six or seven foremen and about six jobsites. A foreman is assigned to run a jobsite. Schultz testified Respondent's foremen all have the same responsibilities.

In 2002, representatives of IBEW Locals 98, 269, and 380 contacted Schultz separately in efforts to persuade him to become a union contractor. Schultz met Local 269 Organizers Tom Bates and Steve Aldrich for dinner. Schultz told all the union officials that union wages would make Respondent non-competitive for its customer base and he declined their recognition requests.

# A. Kevin Byrne's employment at Respondent

Local 269 sent Kevin Byrne to apply for work at Respondent on February 5. Byrne was not a union member at the time and he did not disclose the Union referred him. Byrne walked into Respondent's office and talked to Schultz and Respondent Vice-President Brian Batzel. Byrne filled out an application and took a test. While in the office, Byrne saw a sign on the front door that said not hiring walk-ins. However, Byrne was eventually hired on March 25, although he was a walk-in since he was not referred by any of Respondent's employees. Byrne was told uniforms were coming and money would be deducted from his check to clean them. Byrne's hours of work were 7 a.m. to 3:30 p.m. Byrne was given Respondent's July 25, 2001, employee handbook when he began work and he credibly testified it was the only handbook he ever received.

The July 25, 2001, handbook states at page 2, that, "Any future changes to this handbook will be" ... "issued in writing." The handbook states at page 5, that:

The *theft of time* is a related and equally serious offense which may also result in disciplinary action up to and including discharge. The *theft of time* occurs when an employee is physically present in the office but, for a substantial period of time, is not performing the work for which we, the employer are paying an hourly rate or salary. The *theft of time* includes engaging in a variety of non-work activities including excessive personal phone calls, ..., excessive socializing, conducting more-than-incidental personal business, etc.

<sup>4</sup> Scott Schultz is referred to as Schultz. Respondent admits Schultz is a supervisor and agent under Section 2(11) and (13) of the Act, and that, for the purposes of this proceeding. Foreman Walt Egap is Respondent's agent under Section 2(13) of the Act.

manager in some of Respondent's records.

proceeding, Foreman Walt Egan is Respondent's agent under Section 2(13) of the Act. Egan is Schultz' brother-in-law. Schultz' wife Elizabeth Schultz works in Respondent's office. Elizabeth Schultz' did not testify and her title is unclear on this record. Schultz testified he thought she was Respondent's president, and she is described as office

The July 25, 2001, handbook states at page 7, under Dress Code that the employees are to wear, "Work boots, pants and T-shirts."

On March 27, Byrne, while driving one of Respondent's trucks, hit an overhang at a restaurant. Byrne left the scene of the accident, and was required to return there when the police called Respondent's office. Respondent was responsible for repairs at the restaurant and there was damage to the truck.

On April 11, Byrne signed a document acknowledging receipt of Respondent's uniforms stating he was given 11 sets of pants and shirts. Byrne subsequently also received t-shirts from Respondent. All of the shirts contained Respondent's name. At the end of April, Respondent began distributing a new handbook, dated March 18, to new hires which contained all of the above-cited provisions in the July 25, 2001, handbook with the exception of the Dress Code, which was replaced by the following language at page 7 of the March 18 handbook:

All employees are required to wear the uniforms given to you. You will be responsible for 11 sets of clothing. The employee will pay \$2.85 through weekly payroll deductions, and the company will pay the other portion....<sup>5</sup>

Byrne missed work on the following days as reflected by his attendance records: April 17, May 14, May 20, May 21 and June 7. Schultz' testimony reveals that he gave Byrne an oral warning for his attendance on May 22. It is reflected in Schultz' prehearing affidavit that, "The oral warning seemed to stop the attendance problems, as he was out only one more time after that."

Byrne credibly testified to the following May conversation in Schultz' office between Schultz, Foreman Carl Sadler, and Byrne: Schultz asked Sadler and Byrne who referred them to Respondent and how long they had been working there. Schultz said something about the Union, and Byrne asked a question about it. Schultz and Sadler said when they get union guys in there they start things. Schultz said he was trying not to hire guys from the Union in his shop.<sup>6</sup>

5 While Byrne was hired

<sup>&</sup>lt;sup>5</sup> While Byrne was hired on March 25, I have credited his testimony that he was issued the July 25, 2001, rather than the March 18 handbook. I do not find Schultz' claim that he gave Byrne the March 25, handbook to be convincing. Schultz gave no explanation why he would recall which handbook he gave Byrne, and his recollection about rule changes was hazy. For example, he initially testified he did not know when he stopped issuing the July 25, 2001, handbook. He also made a statement in his prehearing affidavit that, "New handbooks with the changes are not distributed until we run out of the old handbooks." Moreover, Respondent was not able to produce Byrne or Jeffrey Dence' handbook acknowledgement sheets. Dence was hired on April 15, next in line after Byrne's March 25 hiring date. Yet, Respondent was able to produce a series of employee acknowledgement sheets beginning on April 22, showing that new hires at that time began to receive the March 18 handbook. The acknowledgement sheets for the July 25, 2001, and the March 25, handbooks contain different page numbers. I find it more than coincidental that the two sheets Respondent could not locate were Byrne's and the employee hired right after him.

<sup>&</sup>lt;sup>6</sup> Having considered their demeanor, I have credited Byrne's testimony over Schultz' denial that this conversation took place. For reasons set forth in detail below, I did not

Byrne worked at Respondent's NBA Bank jobsite for most of his assignments during April 29 to June 14. The NBA jobsite was located close to Byrne's home. Respondent Warehouse Manager Daniel Kurtz credibly testified he called Byrne on Friday, June 14, and told Byrne his assignment would be at the Harlan House jobsite the following week. Kurtz told Byrne he needed to report to the shop early Monday morning to receive a ride to the site. During a subsequent phone call initiated by Byrne, Kurtz repeated these instructions to Byrne. Despite these instructions, on Monday morning June 17, Byrne reported to NBA site instead of Respondent's facility. As a result, Kurtz directed Sadler, the foreman at the NBA site, to send Byrne to Harlan House where Byrne was tardy as he did not report there until 8 a.m.<sup>7</sup> Schultz' testimony reveals that on June 18, Byrne told Schultz that he could not work at Harlan House because it interfered with his second job. Schultz responded he needed people at Harlan House and he denied Byrne's request to return to the NBA jobsite.<sup>8</sup>

# 1. Wednesday, June 19

Byrne's credited testimony reveals that: On Wednesday, June 19, Byrne worked at the Harlan House jobsite. He wore blue jeans, a white t-shirt and boots, which he wore on a frequent basis to work. He was not wearing a J & S shirt. After work, Byrne spoke with Local 269 Organizer Aldrich who told Byrne a fax was sent to Schultz stating Byrne was a volunteer organizer. Aldrich gave Byrne union literature, stickers, and authorization cards. Schultz testified he received the Union's fax on June 19, and he noted in Byrne's personnel file that Byrne was a union organizer.<sup>9</sup>

# 2. Thursday, June 20

Before reporting to work on June 20, Byrne placed three union stickers on the rear window of his truck. Byrne arrived at Respondent's shop at 5:30 a.m. and wore a white t-shirt, and blue jeans. He did not wear Respondent's uniform. Byrne left about five copies of the Union's brochure on Respondent's shop desk located in front of a glass window facing Kurtz' office. The employees use the window to view a bulletin board in Kurtz' office where their assignments are posted. The Union's brochure named Local 269, and described the Union's wages and benefits. Schultz testified he saw Byrne placing the Union's documents on the shop desk. As a result, Schultz made another note in Byrne's personnel file stating, "Kevin B. left these on our counter 1st thing

find Schultz to be a very reliable witness. Moreover, Sadler remained employed by Respondent, and I find Respondent's failure to call him creates an inference that Sadler would not have supported Schultz' testimony. In this regard, Respondent's foremen are closely aligned with management as Schultz testified they all performed the same function, which includes conveying instructions to employees, overseeing the jobsites, and relaying performance problems with employees at the jobsite to Schultz.

- <sup>7</sup> Byrne's recollection was hazy as to his phone calls with Kurtz, although he eventually admitted Kurtz called him and told him to report to the shop on June 17. Yet, despite Kurtz' instruction, Byrne reported to the NBA jobsite.
- <sup>8</sup> Byrne testified that, during this conversation, Schultz also said Byrne had been doing a good job at the NBA site and he needed someone at Harlen House who could get the job done. However, Byrne admitted Sadler found fault with at least one aspect of his work at the NBA Bank site where he installed receptacles without using a level, and I have no basis to credit Byrne's testimony over Schultz' version of the conversation.
  - <sup>9</sup> Schultz testified he received the fax on June 19, but dated the file memo June 18.

in the morning." Schultz also placed a copy of the Union's brochure in Byrne's file. Byrne and General Counsel witness Robert Teeling's credited testimony reveals items such as Six Flags coupons, a local pizza shop menu, and advertisements for items employees were selling were regularly displayed on the shop desk. Respondent also maintained various work-related forms on the shop desk.

On the morning of June 20, Schultz posted Local 269's letter stating Byrne was a union organizer on the shop window looking into Kurtz' office. The words "Look at this" were printed in large print highlighted next to the letter. The letter was posted on the office side of the glass facing the shop until Byrne was discharged on June 25.<sup>11</sup>

Byrne's credited testimony reveals: When Byrne arrived at the Harlan House jobsite on June 20, Egan came up to Byrne around 7 a.m. in Respondent's supply room. Egan told Byrne whatever Byrne was selling, giving away, or doing for the Union was not allowed on Egan's job. Egan told Byrne not to give anything out on the job. Byrne said he was allowed to hand things out on his lunch break. Egan replied, "Not on my job." Egan said Byrne was not allowed to talk Union, and not allowed to hand anything out. This was a one on one conversation with about 5 or 6 of Respondent's employees coming in and out of the small room at the time.

Byrne's credited testimony reveals: Byrne had conversations with 4 or 5 of Respondent's employees at the Harlan House jobsite on June 20 about the Union, during working time.<sup>13</sup> The conversations were between 2 to 10 minutes each. The employees questioned Byrne about his status as a union organizer. Byrne did not stop working when he talked to employees. While Byrne was not assigned to work with a partner, other employees worked in the same hallway, in the room next to him, around the corner, and an employee named Chris worked in the same room with Byrne.<sup>14</sup> Byrne and Teeling credibly testified employees had non-work related conversations all day long on such topics as vacations, buying a car, and social lives.<sup>15</sup>

<sup>10</sup> Teeling worked for Respondent from August 2001 until his August 2002 discharge.

<sup>11</sup> I have credited Byrne's testimony as to the nature and length of time of Schultz' posting of the Union's June 19, letter. Schultz admitted to posting the letter. However, I do not credit Schultz' claims that it was posted only 1 or 2 days, that he did not know who wrote the remark "Look at this," and that when he saw it he took it down. Byrne's testimony reveals that he saw the letter posted early in the morning on the inside of Kurtz' office window, the day after the Union faxed it. Considering the location of the letter and the timing of its posting, even assuming Schultz did not write the words "Look at this," I have concluded he knew who did and was responsible for it being written there. Kurtz, who appeared as a witness for Respondent, was not questioned about the letter.

<sup>&</sup>lt;sup>12</sup> Byrne testified, in his pre-hearing affidavit, that Egan made the following statement on June 20, "Don't be handing out any of your literature about the Union and don't be talking about the Union on my time. I don't care what you do on your own time, but don't do it on my time." Byrne explained this statement at the trial by stating he had the impression that Egan was stating Egan's time was 7 a.m. to 3:30 p.m., because when Byrne brought up lunch break, Egan said, "Not on my job."

<sup>&</sup>lt;sup>13</sup> Byrne credibly testified he did not converse with Chris Rueth about the Union.

<sup>&</sup>lt;sup>14</sup> Christopher Class, a former employee of Respondent, credibly testified that he worked in the same room with Byrne, that they discussed the Union and non-union topics while working and that their conversations did not interfere with their productivity.

<sup>&</sup>lt;sup>15</sup> Similarly, Respondent officials Schultz and Egan testified employees routinely talk

Byrne returned to the shop at the end of the day on June 20, in a company vehicle. When he arrived at Respondent's parking lot, Byrne's personal truck had salt grains on the hood and one of the truck's Union stickers was changed to read "Proud to be a Union Salt." Byrne showed Schultz the truck and Schultz said if he found out who did it, Schultz would take care of it. Byrne's truck would not start and Teeling attempted to help him jump-start it. Byrne and Teeling credibly testified that, while they were in respondent's parking lot, Schultz came out and said to Byrne, "why don't you call your buddies from Local 269 to come and help you?" Schultz left and about 10 to 20 minutes later, Schultz returned in Schultz' truck. Byrne credibly testified that: Schultz asked Byrne to come over to talk to him. Schultz asked Byrne, "Why are you doing this to me?" Byrne said, "I want to go into the Union." Byrne described certain benefits the Union provided that Respondent did not. Schultz said he had a friend get screwed by the Union and they are nothing but liars and back stabbers. Schultz said Byrne would only work for six months a year and that "there was no place for a Union in his shop."

When Schultz left, Byrne called Aldrich, who came over and helped Byrne start his truck. Byrne credibly testified that, while Aldrich was in the parking lot, Foremen Egan and Rueth pulled up and walked into the shop. Aldrich left, and then they came out of the shop. Egan asked Byrne if he was going to be at work tomorrow. Byrne said yes, and asked, "why wouldn't I?" Egan said, "Well, this whole Union thing."

I have credited Byrne's testimony as set forth above as to the events of June 20. In this regard, Teeling, who I considered to be a credible witness, corroborated Byrne in certain key respects. The fact that Teeling did not recall or hear all aspects of the conversations in which he was just a bystander, does not undercut the fact that he, along with Byrne, credibly testified to certain negative references to the Union by Schultz in the face of Schultz' denials that he made such remarks. Moreover, Byrne's testimony, considering his demeanor, was marked by good recall and had a ring of truth as he admitted discussing the Union with coworkers during working time.

On the other hand, I did not find Schultz and Egan's testimony to be very convincing. Their testimony was somewhat inconsistent, shifted during the hearing, was undercut by statements in pre-hearing affidavits and Schultz' contemporaneous notes, and had an air of exaggeration.

Schultz used the terms company time, working hours, and work time interchangeably at the hearing in terms of his instructions about a no solicitation rule.

about personal topics while working. Egan testified, "As long as we're getting work done, of course people chat and just talk about whatever as you're working." Egan testified that he talks to employees about the Philadelphia Eagles while working, "Especially if there's a big game, sure." Schultz testified that there is no rule against talking on the job in Respondent's handbook and when asked if there was a rule against conversing with other trades at the jobsites, Schultz replied, "Not that I'm aware of."

- <sup>16</sup> Teeling confirmed Schultz told Byrne the Union was nothing but liars and back stabbers. Teeling could not recall the remainder of the conversation.
- <sup>17</sup> I have credited Byrne over Schultz' denial that this conversation took place. Schultz incredibly claimed he did not discuss the Union at all with Byrne on June 20.
- <sup>18</sup> Teeling confirmed that Egan came to the parking lot, but could not recall the contents of any exchange between Egan and Byrne.

Schultz initially testified that he told Byrne on June 20, he could not talk about the Union on company time. He then testified that, at that time, he told all of Respondent's foremen the employees were allowed to talk about and promote the Union during lunch time, "not during working hours." Schultz testified he did not implement this policy until he heard Byrne was talking about the Union. Schultz testified it was his understanding that, under the law, employees were not allowed to promote the Union during "company time." Schultz testified, "If you're talking about it, you're promoting it. I don't know the difference." When asked if the employees could talk about anything they wanted while working, except for the Union, Schultz replied, "Yeah. I guess." He testified the employees could ask someone to join a bowling league during work time, but they could not ask someone to join a union. However, Schultz' testimony shifted as he began to realize the inconsistency of his position. Schultz later testified it would be okay if an employee talked about the Union during working time if they did not stop or slow down their work or interfere with someone else's work. Yet, Schultz admitted he told Egan and his other foreman, without further explanation, that Byrne was not allowed "to talk or promote the Union on company time." Schultz testified the morning after he received the fax announcing Byrne was a union organizer, Schultz called Egan and told him Byrne "is allowed to talk about the union on his lunch break, his lunch time and break and that's all, he's not allowed to promote the union on company time."

Egan testified that, "On company time, which is work time, you're not to discuss anything union, handout any paper works, only on your time." Egan mistakenly claimed this rule was in Respondent's handbook. Egan testified he told the employees at Harlan House this rule when they met to receive their assignments after he learned Byrne was a union organizer. Egan testified Byrne violated the rule since employees told Egan that Byrne was bothering them, during work time, talking about the Union's benefits. Egan testified he told Byrne, "You can't talk about union and you know or anything about disrupting the job during company time, ..." Egan testified almost all of Respondent's employees came to him about Byrne's union solicitation, including Bob Teeling and Chris Class. Egan testified he reported these incidents to Schultz and again spoke to Byrne about talking about the union on company time, and Byrne kept denying it.

Byrne admitted, during his testimony, talking to Respondent's employees about the Union while working, and I have no doubt Egan learned of Byrne's activities. However, I do not credit Egan's claims that employees complained to him about Byrne. Contrary to Egan's assertions, Class and Teeling credibly testified they never complained to Egan about Byrne. Similarly, Schultz testified that on June 20, Respondent Foreman Rueth and employee Drew Taylor told Schultz that Byrne asked them during work time if they would like to join the Union. They said no, but Byrne persisted in asking them. Schultz testified he assumed they had to stop working as a result of the conversation. However, Schultz later admitted he did not determine if Byrne interrupted their work nor ask the length of the conversation.<sup>19</sup>

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<sup>&</sup>lt;sup>19</sup> Schultz' testimony about Rueth and Taylor in his pre-hearing affidavit differed from his testimony at the hearing. In the affidavit, Schultz testified on June 19, "Chris Rueth and Drew Taylor told me they had observed Byrne talking about the Union to employees during working time while holding literature." Similarly, in the affidavit, concerning June 20, Schultz testified that, "Rueth and Drew Taylor again told me Byrne was talking about the Union during working time while holding literature." Thus, the affidavit is written in the context that Rueth and Taylor merely observed Byrne talking to other employees, not themselves, as Schultz claimed at the hearing.

I have concluded it was Schultz and Egan's intent to bar all conversations about the Union while allowing conversations about other non-work topics between employees while they were working. I do not find that Byrne's conversations with Respondent's employees about the Union were disruptive of employees' work any more than were other non work related conversations that Respondent regularly permitted. I have concluded that it was not Byrne's conversing with his co-workers during working time that inflamed Schultz and Egan. Rather it was the topic of his conversation.<sup>20</sup>

# 3. Friday, June 21

Byrne credibly testified that: On June 21, he handed out union pamphlets to four employees during his lunch break at the Harlan House jobsite. Byrne also gave one of the pamphlets to Rueth, and he tried to give one to Egan. Egan told Byrne, "he would fuckin' burn it."<sup>21</sup> Byrne engaged in brief conversations about the Union with employees while they were working on June 21, as employees asked him about the Union's wages and benefits. Byrne testified the employees continued to work while they spoke.

Schultz issued a memo, dated June 20, to employees with their paychecks on Friday afternoon on June 21.<sup>22</sup> The document reads:

**EFFECTIVE IMMEDIATELY**-No organization documentation is to be left at any of our jobsites or left at our facility and can only be given out during the ½ hour lunch break.

Schultz testified the memo was a new rule and Byrne's placing the union literature on the shop desk on June 20, prompted him to write it stating, "I didn't want a pile of trash left either on the job or at the shop." Schultz testified he also heard Byrne was distributing union literature at the jobsite during his lunch break. Schultz testified in addition to lunch; Respondent's employees have a daily break from 9:05 to 9:15 a.m.

## 4. Monday. June 24

## a. Byrne wears a union shirt to work

Byrne credibly testified that: Byrne reported to the Harlan House jobsite on Monday, June 24, wearing a t-shirt with a small insignia stating, "Local 269 IBEW

<sup>&</sup>lt;sup>20</sup> I do not credit Schultz' testimony that Egan reported to him that Byrne used his cell phone on June 20 at various times for 5 to 10 minutes a call. Schultz failed to document these phone call allegations against Byrne in the daily notes he was keeping of Byrne's activities or in his pre-hearing affidavit of September 24.

<sup>&</sup>lt;sup>21</sup> I do not find Byrne's attempt to hand Egan union literature during lunch break on June 21, inconsistent with Byrne's testimony that on June 20, Egan told Byrne he could not engage in such conduct. Byrne told Egan on June 20, that he was entitled to distribute literature during his lunch break. I have concluded Egan reported this conversation to Schultz, who had been apprised by the Union in its June 19 fax that Byrne's activities as an organizer were protected under the Act. I therefore find that when Byrne told Respondent's officials he had a right to distribute during the lunch break on June 20, that Respondent acceded to this position the following day.

<sup>&</sup>lt;sup>22</sup> Byrne credibly testified his copy of the memo was stapled outside his pay envelope, while the other employees received their copies inside their envelopes.

Electricians" and blue jeans. He was 15 minutes late to work. Around 9 a.m., Egan assigned Byrne and Teeling to repair wire in an outdoor pipe feeding a light post. While they were working, Egan walked up to Byrne and asked what was up with Byrne's shirt and if Byrne was in the Union to which Byrne said he was not. Egan told Byrne that Tim Shipwash, the foreman for the general contractor C & C, Inc., asked Egan why Byrne was wearing the shirt.<sup>23</sup> Egan told Byrne he was supposed to wear a company t-shirt. Byrne replied the company handbook states, under dress code, that he had to wear jeans, a t-shirt, and boots, which he was doing. Egan told Byrne he was not allowed to wear a union t-shirt because it was not a union job.<sup>24</sup> Teeling's credited testimony reveals Teeling was wearing a white t-shirt on June 24, as opposed to one of Respondent's shirts, but no one said anything to him about his shirt.

Byrne and Teeling's credited testimony reveals that: Egan returned with Shipwash about 20 minutes later to the area they were working. Shipwash asked Byrne what was up with the shirt and if Byrne was in the Union to which Byrne said no. Shipwash said Byrne was not allowed to wear those shirts on these jobs. Shipwash told Byrne he had 5 minutes to turn the shirt inside out or be dismissed from the job and Egan said, "You heard the man."

Byrne credibly testified that: Byrne went into a nearby port-a-john and called Aldrich on his cell phone. Aldrich told Byrne to turn the shirt inside out but to get Shipwash' name and the name of his employer. Byrne turned the shirt inside out and then entered C & C's trailer. Byrne asked Shipwash for his name and the name of his employer. Shipwash stood up and said, "Get out of here, you Union-fuckin' scumbag." As he was leaving the trailer, Byrne told Shipwash he did not like his comment. When Byrne was about 10 or 15 feet away from the trailer, he turned and saw Shipwash running towards Byrne with Egan following him. Shipwash got to within a foot of Byrne and Shipwash said, "What did you say to me; what did you say?" Byrne said he did not say anything. Egan told Byrne to tell him what he said. Byrne again denied saying anything. The conversation went back and forth in this manner when people from other trades started to gather. Byrne said he was going back to work, and returned to work.

Schultz and Egan's testimony concerning this incident lacked credibility. Egan testified that: Egan received reports from two Dual Temp employees that Byrne was talking to them about joining the Plumber's Union during working time. Thereafter, Shipwash called Egan and complained Byrne had approached the excavator about joining the Operating Engineers Union and was stopping him from working. When he received the call, Egan saw Byrne standing next to the backhoe, talking to the excavator. Byrne was not working. Egan approached Byrne and told him, "You're talking about the union again and you're disrupting the job site and nothing's getting done here." I do not find Egan's claim that Byrne was talking to Dual Temp employees to be credible. While from Egan's testimony it appears that his conversation with Byrne took place in the morning, Schultz testified Egan reported the incident with the Dual Temp employees as occurring later in the afternoon. Moreover, there is no reference in Schultz' notes or affidavit to Byrne conversing with Dual Temp employees on June 24.

<sup>&</sup>lt;sup>23</sup> C & C. Inc. will be referred to as C & C.

<sup>&</sup>lt;sup>24</sup> Teeling confirmed Byrne was wearing a union t-shirt and Egan approached Byrne and asked him what was up with his shirt. Teeling did not hear the rest of the conversation because Egan pulled Byrne aside while Teeling continued to work.

<sup>&</sup>lt;sup>25</sup> Shipwash did not testify at the trial.

Egan also testified that, when he approached Byrne, he saw Byrne was wearing a union shirt, and told him that this violated company policy. Egan incredibly denied telling Byrne to turn his shirt inside out, and claimed he was not present when Shipwash gave Byrne that instruction. However, Egan's pre-hearing affidavit contains the statement, "I also noticed he was also out of company uniform. I said to him, 'You are out of uniform again, either change your shirt to J&S or turn it inside out.'" Moreover, Respondent admits in paragraph 7(b) to its amended answer to the complaint that "after seeing an employee out of Company uniform again, Egan told the employee to change to a Company shirt (or if the employee did not have one, to turn the shirt inside out.)"

Schultz' testimony similarly was unworthy of belief. He testified that: Schultz received a call from Egan saying Shipwash reported to Egan that Byrne was disrupting the job by talking to a landscaper about the Union and interfering with his work. Egan told Schultz that when Egan approached Byrne about talking to the landscaper, Egan noticed was Byrne was not wearing a company shirt. Schultz testified that to his knowledge, Shipwash asked Byrne to turn his shirt inside out, but Schultz was not sure whether Egan also gave Byrne that order. Schultz initially incredibly claimed he did not know why Byrne was asked to turn his shirt inside out stating he did not know it was a union shirt. Yet, Egan testified that he told Schultz that Byrne was wearing a union shirt.

Egan testified that: When Byrne entered C & C's trailer, he spoke in a loud manner and asked Shipwash for his name, phone number, home address and his employer's name and number.<sup>27</sup> Shipwash told Byrne to, "Find out for yourself" to which Byrne replied, "Well, you're not going to like this."

However, Schultz' notes of June 24, serve to corroborate Byrne's testimony rather than that of Schultz and Egan. The notes read, in pertinent part, as follows:

Later in morning Tim Shipwash asked Walt E. why Kevin was wearing a local 269 shirt. Walt E. ask Kevin why he was out of uniform. Kevin said he didn't have to wear shirt because it wasn't in our policy. Tim ask Kevin to turn the shirt inside out. Kevin called BA then turned shirt inside right. Then Kevin went into C & C job trailer demanding Tim S. to give him name & phone # of company. Tim told him to leave the trailer.

The notes confirm Byrne's testimony that his wearing a union shirt lead to the June 24, incident in that Shipwash and Egan confronted Byrne about wearing a union shirt and not about Byrne's alleged talking to the excavator or any other employees. Schultz' notes, as well as a written verbal warning he drafted about the incident, also confirm Byrne's testimony that he only asked Shipwash for his name and information about his employer, as opposed to any personal information as Schultz and Egan testified.

<sup>&</sup>lt;sup>26</sup> Schultz testified landscaper was another name for the excavator employee.

<sup>&</sup>lt;sup>27</sup> Schultz testified Egan told him that Byrne entered the trailer yelling at Shipwash to give him his name, number, address, phone number, and the name of his employer.

<sup>&</sup>lt;sup>28</sup> In Schultz pre-hearing affidavit and daily notes he reported it was June 25, not June 24, that Shultz was informed Byrne was talking to the landscaper or excavator.

# b. Byrne's phone call with Union Official Aldrich

Byrne credibly testified that on June 24, Aldrich called Byrne a couple of minutes after noon and they had a 5 minute phone call. After the call, Byrne went to get his lunch and ran into Egan who said Byrne's 20 minute phone conversation, and his 15 minute late arrival to work were going to be turned in. Byrne said he was only on the phone 5 minutes, and it was part of his lunch break. Byrne retrieved his lunch, went downstairs and told Teeling what happened. Byrne took 10 minutes to eat and returned to work. Teeling credibly testified that Byrne was only on the phone for around 5 minutes and it was during lunch break.

I have credited Byrne and Teeling's description of Byrne's June 24 phone call over Egan and Schultz' claims. Egan testified that, after the trailer incident on June 24, he saw Byrne on his cell phone during working time and he reported it to Schultz. Schultz testified that, on June 24, Egan told him that Byrne was on the phone 30 minutes and then again for 20 minutes during work time. However, Schultz only issued one written verbal warning for Byrne's phone usage for June 24, for a 15 minute period, confirming Byrne's testimony that Egan only complained of one incident to Schultz.

## c. Byrne tenders the resumes of five union applicants to Schultz

Byrne credibly testified that: Byrne returned to the shop around 5 p.m. on June 24, with five resumes provided to him by Aldrich. Byrne entered the office and told Schultz he had some resumes for him. Byrne showed Schultz the resumes, and Schultz said these are the same ones that were just faxed to him.<sup>29</sup> Byrne replied that Schultz sent a reply stating he only accepted resumes through personal referrals, so Byrne was giving them to Schultz. Schultz did not ask Byrne any questions; he just looked at the resumes and said. "I don't want these." and threw them on a secretary's desk. Byrne testified he knew the individuals named in the resumes through social gatherings but that he had never worked with them. Byrne testified the applicants had told him they had gone to school and were journeymen electricians.

I do not find Schultz' testimony concerning this conversation worthy of belief. Schultz testified Byrne came into the office and "he started rambling on, I don't even remember what he said, he came in and threw papers down on my desk ...". Schultz told Byrne, "I don't want nothing from you", and "I don't want to hear nothing." When asked if he knew what papers Byrne had with him, Schultz testified, "No." However, Schultz later admitted that he picked up the papers and saw Bates' resume on the top.<sup>30</sup> Schultz denied looking at the rest of the papers testifying he did not want to accept

<sup>&</sup>lt;sup>29</sup> Byrne handed Schultz the resumes of alleged discriminatees Aldrich, Hnatkowsky, Huston, Andra, and Bates. Bates had previously faxed Schultz these resumes plus seven others on June 20, and an additional set of about 12 resumes on June 21. By letter dated June 21, Schultz returned all of the resumes and informed Bates that, "It is not our company policy to accept any applications via fax, phone, walk-ins or mail." The complaint only alleges Respondent violated the Act by refusing to consider for employment the five applicants whose resumes Byrne hand delivered to Schultz.

<sup>&</sup>lt;sup>30</sup> Despite this admission at the hearing, Schultz testified in his pre-hearing affidavit that, "Byrne never delivered resumes to my office from the following applicants (or any other job applicants) on this day or any other day: Stephen Aldrich, Michael Hnatkowsky, James Huston, Richard Andra, and Tom Bates."

anything from Byrne. Schultz testified, "It was the end of the day after I had multiple problems with him that he comes in to hand me a referral, it looked like, you know, papers, the first one." Considering the shifting nature of his testimony, I do not credit Schultz' claim he was not aware Byrne presented him with several resumes on June 24 and I have credited Byrne's account of this conversation.

# 5. Tuesday, June 25

# a. Schultz issues an oral warning to Byrne

Byrne credibly testified as follows: On June 25, Byrne wore jeans, boots, and a t-shirt with a gray American Eagle to work. Teeling wore a t-shirt saying "Diva's Gentleman's Club." Around 9 a.m. Byrne and Teeling were assigned to load a trailer with supplies. Schultz came by and told Byrne he was informed of Byrne's 20 minute phone call, about Byrne's being late, and about him not wearing a company uniform the day before. Schultz told Byrne he had to wear a company uniform. Byrne asked to see a written uniform policy, because under Respondent's handbook the uniform policy was jeans, t-shirt and boots. Byrne told Schultz to tell his bogus foreman referring to Egan to back off him because Egan was breathing down Byrne's neck trying to find something wrong. Byrne spoke in a normal tone of voice. Schultz told Byrne this was an oral warning. Teeling continued working while Schultz and Byrne spoke.

Both Schultz and Egan testified about this conversation and to the extent their versions differed from that presented by Byrne, I have credited Byrne who, considering his demeanor concerning the exchange, I found to be a credible witness. I do not credit Schultz' claim that, during this discussion, he told Byrne, "only to be talking about and promoting the union on lunch break, I've gotten information from other people that you're continually doing it during work time -- -- and stop disrupting the job." While Schultz had drafted multiple warnings for Byrne for the events of June 24, Schultz had not drafted a warning about this aspect of Byrne's conduct, nor did he record such a directive to Byrne at that time in his daily notes or in his pre-hearing affidavit. Similarly, I do not credit Egan's testimony that Schultz told Byrne he was giving him a warning disrupting the jobsite and job performance. Here again, I have concluded that Schultz and Egan tried to shade their testimony to make a case against Byrne.

## b. Byrne's June 25 discharge

Byrne testified as follows: Around 12:30 p.m., Byrne and Teeling were loading Respondent's trailer and Schultz, Egan, and Shipwash came by. Schultz told Byrne he had proof from three construction workers that Byrne was talking about the Union on company time. Schultz told Byrne he was firing him for talking about the Union on company time. Byrne asked Schultz to sign a statement to that effect, and he told Schultz that he could not fire him for that reason. Schultz also told Byrne that Byrne had been bad mouthing Respondent. Schultz, Egan, and Shipwash escorted Byrne off the jobsite. Byrne admitted he could have told Schultz that Byrne got exactly what he wanted when Schultz fired him.<sup>31</sup> Teeling testified he was 40 feet away from the conversation, but he heard Schultz tell Byrne he had three witnesses that Byrne was talking about the Union on the job.<sup>32</sup>

<sup>31</sup> Byrne was hired by a union contractor at higher pay a day after his discharge.

<sup>&</sup>lt;sup>32</sup> Byrne credibly testified he did not receive a warning from Egan about his work

Teeling credibly testified that: Teeling wore a "Gentleman's Diva Club" shirt to work on June 25. After Schultz discharged Byrne, Schultz asked Teeling where his company shirt was. Teeling responded he did not have any dry clothes. Schultz did not say anything else about Teeling's shirt, nor was Teeling directed to change his shirt.<sup>33</sup> After Byrne's discharge, Teeling continued, as he had before the discharge, to wear Respondent's uniform only about half of the time to work and no one said anything to him about it either before or after June 25. Egan drove Teeling back to the shop from the jobsite at the end of the day on June 25, and Egan told Teeling during the drive that, "When you're in the Union, you'll be unemployed and out of a job."<sup>34</sup>

Schultz gave differing accounts of his discharge conversation with Byrne. Schultz testified at the hearing that: Schultz told Byrne that Schultz had spoken to three people who said Byrne was disrupting them at their work place, and that "you keep promoting the union on to them during work time." Schultz told Byrne "I'm terminating you for the reasons that you're disrupting this job on more than one occasion, you're not wearing company uniform and that you are totally violating any kind of rule or any kind of company policy". Byrne started to become loud and he said, "So you're firing me for talking about the union?" Schultz denied it and said he was firing Byrne for disrupting the project. Byrne said, "This is great", and that "I got what I wanted". Byrne made a phone call and said on the phone that, "Hey, I just got fired for talking about the union", and that "I have a few NLRB charges to bring up against this guy."

Schultz gave a somewhat different account of the conversation his pre-hearing affidavit and in his June 25 notes. Schultz stated in the affidavit, "I told him: 'You're terminated because you're continuing to cause a disturbance on the job.' He did not give me a chance to give him any other reasons for being fired because he kept talking, so I did not give him other reasons." Schultz gave the following summary of the conversation in his June 25 notes:

I asked Tim S and Walt E. to witness my talking to Kevin B. Bob Teeling was also there. I went up to him (and) asked him if he was talking to excavator about union on co. time. He denied, then asked if he was talking to C & C employees about union & putting J & S Elect down. He denied it. He kept asking who, what, when. I was trying to explain to him but he said I can't fire him. He was non-stop gabbing. I was trying to tell him the reason. He kept saying you fired me for talking about union. He then call his boss (I presume) told them he got fired for talking about union. Then said yeh he had a couple NLRB charges to file against us.

Kevin said I was making a mistake. As we were walking him off the job site he was saying this. Kevin said what's a matter Scott you never been through this

performance or work pace at the Harlan House job. Byrne testified he cut holes incorrectly at the Harlan House job, but he did not receive a warning about it. Byrne testified Rueth told him not to worry about it, that they would throw a plate on it.

<sup>&</sup>lt;sup>33</sup> Schultz prepared a written verbal warning for Teeling on June 25, for being out of uniform. Despite Teeling's wearing a white t-shirt on June 24 and a "Gentleman's Diva Club" shirt on June 25, Egan testified he saw Teeling on both dates but that, "I don't believe Bob was out of uniform, that's why I did not say nothing to Bob."

<sup>&</sup>lt;sup>34</sup> While I have credited Teeling's testimony, this comment was not alleged as a violation of the Act in the complaint.

before. He said this is just what he wanted, he got exactly what he wanted. He said I was only hurting myself by firing him. . . . <sup>35</sup>

I have concluded from the various descriptions of the conversation, as well as Byrne's and Teeling's credited testimony, that Schultz told Byrne that he had talked to three construction workers who said Byrne was talking to them about the Union on company time. Schultz told Byrne he was firing him for talking about the Union on company time and Byrne said he could not fire him for that. Schultz also told Byrne that Byrne had been bad-mouthing Respondent. Byrne then made a phone call and said he had been fired for talking about the Union and that he had some NLRB charges to file. Following the phone call Byrne told Schultz he was making a mistake, and that Byrne had gotten what he wanted. Byrne told Schultz he was only hurting himself by firing him.

Concerning the events on June 25, that led him to terminate Byrne, Schultz testified that after issuing the verbal warning to Byrne on the morning of June 25, he received a phone call from Egan. Schultz' June 25 notes of the call reflect that:

Walt Egan called me to inform that the General contractor C & C Construction's Foreman Tim Shipwash told him that Kevin was putting J & S Electric down and promoting the Union to his men and the excavator during working hours.<sup>36</sup>

Thus, Schultz' notes reflect it was a report that Byrne was promoting the Union and putting J & S down during working hours that caused him to return to the jobsite on June 25. Rather, than a report that Byrne was disrupting employees' work as Schultz claimed at the hearing.

Schultz testified that, following Egan's call: Schultz returned to the jobsite on June 25 and spoke to Shipwash. Schultz testified in his affidavit that Shipwash "told me Byrne was talking about the Union to other trades." Schultz testified that he asked to talk to the employees, the employees agreed, and Shipwash brought them to C & C's the trailer one at a time. Schultz spoke to C. & C. employee Joe Kish, who said that, while he was working, Byrne came over and asked him if he wanted to join the Laborers Union. Kish also said Byrne said J & S Electric was too cheap to buy its own trailer and things would change around here. Schultz asked if Byrne said anything else, and Kish said, "That's about it". However, Schultz later testified that Kish also told Schultz that Byrne had a cell phone in his hand and said "I can make a call to my boss", the phone rang and he said, "Look, this is my boss". Byrne said, "Look, this is my union rep". Schultz testified he also spoke to C. & C. employee Carl Richards, who basically repeated what Kish said. Schultz testified the trailer the C & C employees were loading was about 20 feet from the trailer Byrne was loading.

<sup>&</sup>lt;sup>35</sup> I do not credit Egan's testimony that Schultz also told Byrne he was terminating him for job performance and use of cell phone on company time. I found Egan's testimony in general to be unreliable and no witness corroborated these assertions.

<sup>&</sup>lt;sup>36</sup> Contrary to Schultz and Egan's testimony at the hearing, I have concluded, based on Schultz' notes, that it was not until June 25, that Schultz received a report that Byrne had spoken to the excavator also referred to as a landscaper employee.

<sup>&</sup>lt;sup>37</sup> I do not credit Schultz' testimony at the hearing that Shipwash told him that Byrne was interfering with two C & C employees on company time.

Schultz testified that, on June 25, he also spoke to the landscaper or excavator employee, who Schultz named in his affidavit as Doug Ruth. Schultz testified at the hearing that: Ruth told Schultz that Byrne approached him on two occasions on June 24 and Byrne wanted to know if Ruth wanted join the Operating Engineers. Schultz claimed that Ruth told Schultz that he told Byrne, "I'm not interested. I'm going to get back to work." However, contrary to Schultz claim at the hearing that Ruth was bothered by Byrne, Schultz testified in his affidavit that, Ruth told him that Ruth gave Byrne "his phone number to call him about the Union." Schultz testified Byrne was working 10 feet away from Ruth's location.

## Schultz testified in his affidavit that:

Based on my conversations with these employees, I determined that these conversations had occurred on working time, and had disrupted the jobsite. I then decided to discharge Byrne. His disruption of the jobsite was one reason, and other reasons were: violations of the uniform policy, I was upset about having to make a second trip that day, and he told me my company policy was not right. These were the only reasons I decided to discharge him. I did not discharge fire him for his Union activity.

However, Schultz testified at the hearing that job performance and absenteeism contributed to Byrne's discharge. Schultz now testified that everything in Byrne's file including his driving accident factored into the discharge decision. Schultz testified that he had received reports about performance problems with Byrne from Sadler at the NBA jobsite, as well as reports of performance problems with Byrne's work at Harlan House including the improper cutting of holes for junction box installation. Schultz also testified it took Byrne too long to fix the pole leading up to the pole lamp and the light did not work when he finished the assignment.

# B. Analysis

- 1. Respondent's Section 8(a)(1) conduct
- a. Respondent's no discussion of earnings rule.

Respondent's July 25, 2001, and March 18, handbooks contain this rule:

You and office personnel should be the only people who know how much you earn. It is important that you keep salary related information **confidential**,... The discussion of salaries will lead to immediate termination of employment.

Respondent admits, in its amended answer to the complaint, that the maintenance of this rule is a violation of Section 8(a)(1) of the Act. Respondent's admission is in accord with long established Board law. See *Exterior Systems, Inc.*, 338 NLRB No. 82, JD slip op. at 22 (2002); *Fredericksburg Glass & Mirror*, 323 NLRB 165, 173-174 (1997); and *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976). Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act by maintaining a rule prohibiting employees from discussing their wages on penalty of discharge.

# b. Schultz informs Byrne that he does not want to hire union members.

The credited testimony reveals that sometime in May, Schultz, during a conversation with Byrne and Sadler, stated that Schultz was trying not to hire guys from the union in his shop. I find that Schultz violated Section 8(a)(1) of the Act by this remark. See, *Exterior Systems*, *Inc.*, supra, slip op. at 3.

## c. Respondent's no solicitation and no distributions rules

# 1. Legal principles

The Board regards rules prohibiting solicitation during "working hours" to be presumptively unlawful because this term connotes "periods that include the employees' own time," whereas rules prohibiting solicitation during "working time" are presumptively valid "because such rules imply that solicitation is permitted during nonworking time, a term that refers to the employees' own time." Our Way, 268 NLRB 394, 394-395 (1983). The Board has held rules that preclude solicitation or talking about the Union on "company time" are presumptively unlawful as they can be "reasonably construed as encompassing both working and nonworking time...". See *Litton Systems*, 300 NLRB 324, 324 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992); *Kenmore Mercy Hospital*, 319 NLRB 345, 346; (1995), and *Industrial Wire Products*, 317 NLRB 190 (1995). In *Jensen Enterprises, Inc.*, 339 NLRB No. 105, slip op. at 3-4 (2003), the Board stated:

It is settled law that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign. *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986).

In *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001), the Board held pertaining to "No-Distribution Rules" that:

A rule prohibiting distribution of literature on employees' own time and in nonworking areas is presumptively invalid. ....The mere existence of an overly broad rule of this kind tends to restrain and interfere with employees' rights under the Act, even if the rule is not enforced. (Citations omitted.)

As with no solicitation rules, the Board has held promulgating a no distribution rule, maintaining it, and threatening to enforce it solely in response to union organizing is unlawful. See *Waste Management of Palm Beach*, 329 NLRB 198, 200 (1999); and *Mini-Togs*, 304 NLRB 644, 651 (1991), enfd. in relevant part 980 F.2d 1027 (5<sup>th</sup> Cir. 1993). Similarly, when an employer implements a rule, which only prohibits distribution of union literature without limiting other distribution it violates Section 8(a)(1) of the Act. See

<sup>38</sup> The presumptions of validity or invalidity of the no solicitation rules can be rebutted by appropriate evidence. Our Way, supra fn. 6.

C.O.W. Industries, 276 NLRB 960 (1985); and Montgomery Ward, 269 NLRB 598 (1984). Finally, the disciplining of employees for union activities pursuant to an unlawful no solicitation or no distribution rule is violative of Section 8(a)(1) and (3) of the Act. See Laidlaw Transit, Inc., 315 NLRB 79, 83; Our Way, supra at 395; Automotive Plastic Technologies, 313 NLRB 462 (1993); Switchcraft Inc., 241 NLRB 985, 986 (1979), enfd. 631 F.2d 734 (7th Cir. 1980); Boland Marine & Mfg. Co., 225 NLRB 824 (1976), affd. 562 F.2d 1259 (5th Cir. 1977); and Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962).

# 2. Respondent's June 20 oral no solicitation and no distribution rules

On June 19, Aldrich faxed Schultz a letter stating Byrne is a "Voluntary Union Organizer who is engaged in organizing activities protected by the National Labor Relations Act." Schultz posted the letter in the shop to employees before Byrne reported to work on June 20. When Byrne arrived at the Harlan House jobsite on the morning of June 20, Foreman Egan, as directed by Schultz, confronted Byrne in Respondent's supply room, which was a relatively small area with other employees walking in and out. Egan told Byrne that whatever he was selling, giving away or doing for the Union was not allowed on Egan's job. Byrne responded he could hand things out on his lunch break. Egan said, "Not on my job." Egan said Byrne was not allowed to talk union and he was not allowed to hand anything out.

I find Egan's comments violated Section 8(a)(1) of the Act in several respects. He banned all union related distributions at the jobsite, including Byrne's right to distribute during his lunch break and break, and in non-work areas and his remarks only applied to union distributions.<sup>39</sup> He also banned all conversations about the union although both he and Schultz admitted that employees were regularly allowed to converse about non-work topics while they were working. Moreover, Egan's remarks were initiated in direct response to Byrne's union activities.<sup>40</sup> The Board's test for determining Section 8(a)(1) violations does not turn on the success of the attempted coercion. Rather, the test is whether the employer engaged in conduct, which reasonably tends to interfere with the free exercise of employee rights under the Act.<sup>41</sup> Thus, I have concluded that Egan's comments were coercive, and the fact that Byrne subsequently did not abide by Egan's dictates does not detract from unlawful nature of Egan's remarks. This is particularly so since Egan testified that his remarks were not directed just to Byrne but to all of the employees at the jobsite.

Schultz testified that, as a result of his being notified Byrne was a union organizer, Schultz told all of his foremen on June 20, that the employees were allowed to talk about and promote the Union during lunch time, but "not during working hours." However, Schultz testimony vacillated as to what he actually told the foremen as he testified he told Egan that Byrne could only talk about the Union during his lunch time and break, and that he could not promote the Union on "company time." He later testified that he told Egan that Byrne was not allowed to promote the Union on "work time." Schultz testified that if an employee is talking about the Union he was promoting

<sup>39</sup> See, *Teletech Holdings, Inc.*, supra at 403, and *Waste Management of Palm Beach*, supra at 200

<sup>&</sup>lt;sup>40</sup> See, *Jensen Enterprises, Inc.*, supra at 3-4; *Litton Systems*, supra; *Kenmore Mercy Hospital*, supra; and *Waste Management of Palm Beach*, supra.

<sup>&</sup>lt;sup>41</sup> See Saginaw Control & Engineering, Inc., 339 NLRB No. 7, JD slip op. at 23 (2003); and American Freightways Co., 124 NLRB 146 (1959).

it, as Schultz did not see a difference between talking and promoting. Egan testified that under the Respondent's policy the employees could not discuss anything about the Union, or handout any papers during company time, which was work time. Egan testified that he conveyed his understanding of the rule to all of the employees who worked at Harlan House on June 20. Following his announcement of the rule, Egan testified he reported to Schultz that Byrne was talking about the Union during "company time." Schultz also testified that Foreman Rueth, along with another employee, reported to Schultz on June 20 that Byrne was talking about the Union during working time.

I find Schultz violated Section 8(a)(1) of the Act by, on June 20, as a result of Byrne's union activity, announcing to his foreman and thereafter maintaining a rule prohibiting employees from talking about the Union, while allowing employees to converse about other non work related topics on working time.<sup>42</sup> The testimony of Schultz, Egan, Byrne, and Teeling establishes that Respondent had allowed and continued to allow on a daily basis non-work related conversations between employees while they were working, and on June 20 only barred conversations about the Union.

## 3. Respondent's June 21 written no distribution rule

Schultz posted the Union's letter June 19 letter in the shop for employees viewing on the morning of June 20. The Union's letter states, in pertinent part that "Byrne is a Volunteer Union Organizer who is engaged in organizing activities protected by the National Labor Relations Act." Thereafter, on June 20, Schultz saw Byrne place copies of the Union's pamphlet on Respondent's shop desk, which theretofore had been used as a repository for non work related postings by employees. On June 21, Byrne handed out union pamphlets to employees at the Harlan House jobsite during lunch break. Byrne gave one to Egan, who told Byrne that, "he would fuckin' burn it.

At the end of the day on June 21, the employees were issued the following new rule, dated June 20, under Schultz' signature:

**EFFECTIVE IMMEDIATELY**-No organization documentation is to be left at any of our jobsites or left at our facility and can only be given out during the ½ hour lunch break.

Schultz testified Byrne's placing the union literature on the shop desk and distribution of the Union literature at the jobsite during the employee's lunch break prompted Schultz to write the rule in that he did not want trash left in the shop or at the jobsite.

I find Respondent, by its June 21 implementation and maintenance of its written no-distribution rule violated Section 8(a)(1) of the Act. The rule was implemented in direct response to Byrne's union activity.<sup>43</sup> The rule is also overly broad in that it limits distributions to employees' lunch break, thereby prohibiting distributions during their daily 10 minute break, as well as before and after work at Respondent's facility. Thus, the

<sup>&</sup>lt;sup>42</sup> As a result of the constant vacillations in the testimony of Schultz and Egan the precise wording of the rule cannot be determined on this record. However, regardless of the wording, the rule was discriminatory as it targeted only conversations about the Union, and it was implemented as a direct result of employees' union activity.

<sup>&</sup>lt;sup>43</sup> See Waste Management of Palm Beach, 329 NLRB 198, 200 (1999).

rule goes beyond limiting distributions during working time and in work areas.<sup>44</sup> The rule is also discriminatory on its face since on June 20, Schultz had posted to employees a letter stating that Byrne is a "Volunteer Union Organizer" engaging in "organizing activities." Thus, the June 21 no-distribution rule applying restrictions only to the distribution of "organization documentation" is a clear reference to union literature. The rule by its terms still allows for most if not all of the previously posted employee materials to remain on the shop desk, with the exception of Byrne's union pamphlets.<sup>45</sup>

# d. On June 24, Egan directs Byrne to remove his union shirt

Teeling was hired in August 2001, and Byrne was hired on March 25, 2002. They each received a handbook dated July 25, 2001. The handbook provides, that "Any future changes to this handbook will be in writing. The handbook states under Dress Code, that employees are to wear, "Work boots, pants and T-shirts."

Respondent at the end of April 2002 began to distribute a new handbook dated March 18, 2002, to new hires. The new handbook revised the employee dress code, stating, "All employees are required to wear the uniforms given to you." Neither Byrne nor Teeling were presented with a copy of the new handbook, nor were they told that the old handbook had been revised. However, after their employment began, Respondent issued them 11 sets of long sleeve shirts and pants. Schultz testified Respondent's pants were gray khakis and the long sleeve shirts were gray and blue striped with a J & S Electrical insignia on the pocket. Respondent subsequently issued five t-shirts to its employees. Egan testified the t-shirt was gray, with J & S Electrical Contractor's, Inc., written on the pocket and across the back.

When Byrne first received Respondent's uniforms, he wore them to work regularly because they were long sleeve shirts and it was still cold. When the weather changed, Byrne began to wear his own t-shirts to work, in a variety of colors rather than Respondent's long sleeve shirts. A couple of weeks prior to his June 25 discharge, Byrne received Respondent's J & S t-shirts. Byrne credibly testified that he only wore Respondent's t-shirts a couple of times, because they were too large. Byrne did not wear Respondent's uniform at all during the period of June 17 to June 25, while he was working at the Harlan House jobsite. Byrne credibly testified that, prior to June 24, no foreman said anything to Byrne about not wearing Respondent's uniform.<sup>46</sup>

Teeling credibly testified that, after he received Respondent's uniforms, there were occasions he wore the shirt without the pants, or the pants without the shirt, and there were occasions when he wore neither to work. Teeling testified when he was not wearing Respondent's shirt, he wore baseball shirts, white t-shirts, the shirts of another electrical contractor, and a gentlemen's club shirt with the word Diva on it. Teeling only wore Respondent's uniform about half of the time to work. Similarly, General Counsel witness Charles Jablanofsky, Jr., who worked for Respondent as a foreman at the time

<sup>45</sup> See *Jensen Enterprises, Inc., Inc.,* 339 NLRB No. 105 (2003); *Kenmore Mercy Hospital,* 319 NLRB 345, 346 (1995); *Litton Systems,* 300 NLRB 324 (1990); *C.O.W. Industries,* 276 NLRB 960 (1985); and *Montgomery Ward,* 269 NLRB 598 (1984).

<sup>44</sup> See Teletech Holdings, Inc., 333 NLRB 402, 403 (2001), 2001,

<sup>&</sup>lt;sup>46</sup> I do not credit Schultz' claim that Respondent official Kurtz had warned Byrne on one occasion about being out of uniform, as Kurtz, who appeared as a witness for Respondent, failed to corroborate Schultz' testimony.

of his testimony, initially testified he did not enforce any rule requiring employees to wear uniforms. He testified that if Byrne showed up out of uniform he probably would not have said anything to him. Jablanofsky testified that while Respondent's uniform called for the employees to wear company pants and shirts, the employees mainly only wore the shirts in that they would come to work "in jeans and stuff like that." Jablanofsky testified he never called management to report that someone was out of uniform.<sup>47</sup>

Byrne's credited testimony reveals that on June 19 and 20, he wore blue jeans, a white t-shirt, and boots to work. Schultz saw Byrne the morning of June 20, placing a union pamphlet on Respondent's desk at the shop. Egan also approached Byrne on the morning of June 20, and told him that he could not give anything out related to the Union on the job, and that he could not talk about the Union on the job. They both also saw Byrne at the end of the day on June 20 in Respondent's parking lot.<sup>48</sup> Neither Schultz nor Egan said anything to Byrne about being out of uniform on June 19, 20, or 21.

On Monday, June 24, Byrne wore a t-shirt to work that had a small insignia stating, "Local 269 IBEW Electricians," and jeans. Teeling wore a white t-shirt that day. Egan gave Byrne and Teeling their job assignment that morning to work on a pipe containing wiring for an outside pole lamp. While they were working, Egan came up to Byrne and told him that C & C foreman Shipwash had asked Egan why Byrne was wearing the shirt. Egan asked Byrne asked if Byrne was in the Union. Egan told Byrne he was supposed to wear a company shirt. Byrne replied Respondent's handbook only required that he wear jeans, a t-shirt, and boots. Egan told Byrne he was not allowed to wear any shirts with writing and he was not allowed to wear a union shirt because it was not a union job. Egan left and then returned with Shipwash around 20 minutes later. Shipwash asked Byrne what was up with the shirt and if he was in the Union. Shipwash told Byrne that he was not allowed to wear those type of shirts on these jobs, and that Byrne had 5 minutes to turn the shirt inside out or he would be dismissed from the job. Egan followed Shipwash' instruction with the remark, "You heard the man."

Teeling wore a "Diva's Gentlemen's Club" shirt to work on June 25, in Shipwash, Schultz and Egan's presence. Egan acknowledged seeing Teeling on June 24 and 25, however, Egan did not say anything to Teeling about being out of uniform on those dates. Shipwash also did not say anything to Teeling about being out of uniform on June 24 or 25. Schultz, after discharging Byrne on June 25, approached Teeling on that date and asked where his company shirt was. Teeling responded that he did not have any dry clothes. Schultz did not say anything else to Teeling about his shirt.

In E & L Transport Co., 331 NLRB 640, 647, (2000), it was stated that:

<sup>47</sup> Jablanofsky also testified in his pre-hearing affidavit that he did not enforce Respondent's uniform policy. I therefore, considering the fact that he appeared uncomfortable testifying in Schultz' presence, do not credit Jablanofsky's subsequent change in his testimony at the hearing when he stated that if he saw an employee without Respondent's shirt on he would tell him to wear it, or that if he saw an employee repeatedly not wearing the shirt he would probably report it to Schultz.

<sup>&</sup>lt;sup>48</sup> It is also likely Schultz and Egan saw Byrne on June 19 and 21 since Byrne was reporting to the shop to obtain a ride to work, and Egan gave him his assignments at the jobsite. Schultz saw Byrne on the afternoon of June 21, as Byrne sought Schultz' assistance in locating his paycheck.

The Board and courts recognize (an) employee's right under Section 7 of the Act to wear and display union insignia on their person while at work. Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia is violative of Section 8(a)(1) of the Act. *Republic aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945).

Special circumstances warranting a prohibition may include instances where the wearing of union insignia has caused interruption in production, disciplinary problems, or disharmony within the work force.... Retail and service establishments have sometimes been permitted to regulate employee appearance to foster a particular public image. See *United Parcel Service*, 195 NLRB 441 (1972); *Burger King Corp v. NLRB*, 725 F.2d 1053 (6<sup>th</sup> Cir. 1984). Even in health care settings, where employers arguably have an interest in maintaining standards of dress and professional decorum, special circumstances are carefully weighed. See *Casa San Miguel*, 320 NLRB 534, 540 (1995). There, rules banning the wearing of union insignia must be justified by a demonstration of an adverse impact on patient care in those areas where the ban applies. *Vista* 

The Board has held that, "An employer violates the Act when it directs, instructs or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affects the working conditions of the latter's employees because of the union activities of said employees. See Dews Construction Corp., 231 NLRB 182, 182, fn. 4 (1977), enfd. 578 F.2d 1374 (3rd Cir. 1978). Moreover, employees of a subcontractor who regularly and exclusively work at the premises of an employer other than their own are not strangers to that property but are rightfully on it pursuant to their employment relationship. As such, their Section 7 rights cannot be unlawfully abridged by another employer asserting control over the property or contractual control over the project on which they are working. See, Gayfers Department Store, 324 NLRB 1246, 1250-1251 (1997); and Capitol EMI Music, 311 NLRB 997, 1000, fn. 22 (1993), enfd. 23 F. 3d 399 (4<sup>th</sup> Cir. 1994), holding that "an employer is properly held liable for its own deliberate actions that affect an individual's employment status with another employer. Thus, an employer that successfully requests the termination of an employee for discriminatory reasons violates the Act and can be required to make the employee whole for loss of pay, even if it is not that employee's employer." The Board went on to state in Capitol EMI that, "The entity acquiescing in the request would not be guilty of an unfair labor practice, however, if it were not aware of the motive behind the request." Id at 1000. fn. 22.

Hill Foundation, 280 NLRB 298 (1986).

In the instant case, prior to June 24, Egan and Schultz allowed Byrne as well as Teeling to report to work out of uniform at Harlan House, and Foreman Jablanofsky's testimony along with that of Teeling and Byrne establishes that Respondent's uniform policy was not enforced. However, Egan, on June 24, joined in Shipwash' request for Byrne to remove his union shirt, and Schultz condoned Egan's conduct by subsequently disciplining Byrne for wearing the union shirt, as well as for Byrne's entering C & C's trailer in a situation in which it was obvious that Byrne was seeking information to file an unfair labor practice charge over Shipwash' discriminatory action in directing Byrne to remove the shirt. Thus, Respondent's officials were aware of the discriminatory nature of Shipwash' conduct and joined in his actions with the purpose of preventing Respondent's employees and other employees at the jobsite from being organized.

I find that Respondent violated Section 8(a)(1) of the Act when Egan approached Byrne on June 24, and told him Shipwash asked why Byrne was wearing a union shirt, and then stated Byrne was not supposed to be wearing a union shirt because it was not a union job. I find that Respondent also violated Section 8(a)(1) of the Act when Shipwash and Egan approached Byrne shortly thereafter and Shipwash told Byrne to turn his shirt inside out or he would be dismissed from the job, and Egan ratified Shipwash' instruction by telling Byrne, "You heard the man." See E & L Transport Co., supra. I find that Respondent, although it had a uniform policy failed to enforce it, until its officials learned that Byrne wore a union shirt to one of its iobsites. Moreover, while Schultz questioned Teeling about wearing his "Gentlemen's Diva "shirt on June 25, Schultz did not tell him to turn the shirt inside out as Egan had done to Byrne the day before concerning his union shirt. Thus, Respondent's targeting Byrne for being out of uniform only when he wore a union shirt was clearly discriminatory rule enforcement against his union activities. I have concluded that since it has been established Respondent did not regularly enforce its uniform policy that Schultz' questioning of Teeling about his shirt on June 25, was a direct result of Teeling's working with Byrne, who had drawn Shipwash, Schultz, and Egan's wrath for wearing a union shirt.<sup>49</sup>

In concluding Respondent discriminatorily enforced its uniform policy against Byrne, I have considered nine written oral warnings Schultz testified he issued to employees on various occasions for being out of uniform, but do not find them to be persuasive in establishing that Respondent regularly enforced its uniform policy. Schultz never tendered these warnings to employees, nor did he tell the employees that the warnings were being placed in their files. As Teeling testified, Schultz just asked Teeling where his company shirt was on June 25. When Teeling responded that he did not have any dry clothes, Schultz did not say anything else about Teeling's shirt. Thus, Schultz did not tell Teeling that a warning was being placed in his file. Moreover, three of the nine warnings for being out of uniform were written for Foremen Egan, Rueth, and Robbins indicating, as Jablanofsky, Byrne, and Teeling testified Respondent's foremen did not enforce its uniform policy. This is confirmed by Schultz, Egan and Respondent's other foremen's failure to react to either Byrne or Teeling consistently being out of uniform until Byrne wore a union shirt to work.<sup>50</sup> I do not find that Respondent has established any "special circumstances" in informing Byrne that he could not wear a union shirt to work, and instructing him to remove it shortly thereafter. The fact that Respondent joined C & C in issuing these instructions to Byrne, which I have concluded were unlawful, does not serve as a defense. See Control Services, 303 NLRB 481, 485-486 (1991), enfd 961 F.2d 1568 (3rd Cir. 1992); and Dews Construction Corp., supra at 182. fn. 4 (1977).<sup>51</sup>

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<sup>&</sup>lt;sup>49</sup> Assuming C & C's policies are relevant, there was no claim that C & C had a policy requiring its employees to wear uniforms or the employees of its subcontractors to wear uniforms. In fact Shipwash said nothing to Byrne about being out of uniform until he wore a union shirt. Shipwash also said nothing to Teeling on June 25, about wearing the "Gentleman's Divas" shirt although both Teeling and Shipwash were present when Schultz discharged Byrne.

<sup>&</sup>lt;sup>50</sup> I also note that five of the nine warnings were drafted after Byrne was discharged.

<sup>&</sup>lt;sup>51</sup> There was no complaint allegation against C & C before me. Counsel for the General Counsel represented C & C entered into a pre-hearing settlement agreement.

# 2. Respondent's Section 8(a)(1) and (3) conduct

# a. Byrnes' June 25 discipline and discharge

Under the Board's Wright Line<sup>52</sup> requirements to prove that an employee was disciplined or discharged in violation of Section 8(a)(3) of the Act, the General Counsel must persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If such a showing is made, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Wright Line, supra at 1089. See also Manno Electric, 321 NLRB 278, 280 fn. 12 (1996). The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. Farmer Bros. Co., 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

Byrne was hired March 25. On March 27, he was involved in an accident with one of Respondent's vehicles. Byrne missed 5 days of work between April 17 and June 7, and he received an oral warning about his attendance on May 22 from Schultz. Sometime in May. Schultz told Byrne that he was trying to avoid hiring union members. I have found Schultz statement to be violative of Section 8(a)(1) of the Act.

During the period of April 29 to June 14, Byrne worked at the NBA jobsite, which was close to his home. On June 14, Byrne was told to report to the shop on June 17, as he was being transferred to another jobsite, which would have given him a much longer commute. Byrne ignored the instruction and reported to the NBA jobsite on June 17. As a result. Byrne was an hour late when he finally arrived at his new assignment.

On June 19, Union Organizer Aldrich faxed a letter to Schultz stating Byrne was a volunteer union organizer. Upon receipt of the letter, Schultz began making a daily log concerning Byrne's activities in particular noting his organizer status.

On the morning of June 20, Schultz posted Aldrich's letter about Byrne's union organizer status on a shop window in plain view of Respondent's employees. The words "Look at this" were written in large print next to the letter showing the significance which Respondent placed to its receipt. On the morning of June 20, Byrne placed union stickers on his truck, which he parked in Respondent's lot, while taking one of Respondent's vehicles to his jobsite. Byrne also placed union literature on a shop desk regularly used by employees and other entities for non work related advertisements. Schultz saw Byrne place the union literature on the desk, and took a copy and placed it in Byrne's personnel file while making a file note of Byrne's conduct. That same morning. Schultz called Egan and notified him of Byrne's union status. Schultz also promulgated a new rule, which he testified he conveyed to all of his foremen prohibiting employees from talking about the union while they were working. By Schultz and Egan's admission, employees were allowed to talk about all other topics while working, and I have concluded that, considering the timing of the rule, and its discriminatory nature, that its implementation and maintenance were violative of Section 8(a)(1) of the Act. I also

<sup>&</sup>lt;sup>52</sup> See Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

found that Egan violated Section 8(a)(1) of the Act when he told Byrne on the morning of June 20, that what he was selling, giving away or doing for the Union was not allowed on his job, and that Byrne could not give out anything on the job, including during Byrne's lunch break. I found that Egan also violated Section 8(a)(1) of the Act when he told Byrne that he was not allowed to talk about the Union on the job. Byrne did not abide by Egan's instructions and spoke to around four or five employees about the Union on June 20, during working time. Respondent foreman Egan and Rueth learned of Byrne's activity and reported it to Schultz.<sup>53</sup>

When Byrne returned to the shop on the afternoon of June 20, salt was placed on the hood of his truck, and one of the union stickers on his truck was changed to read "Proud to be a Union Salt." Byrne complained of these actions to Schultz, who denied responsibility. However, when Byrne subsequently could not start his truck, Schultz came out to the parking lot and asked Byrne why he did not call his buddies from Local 269 to help him. Schultz left and returned and then called Byrne over to Schultz' truck. Schultz asked Byrne why he was doing this to Schultz. Byrne said he wanted to go union and described some benefits the Union provided that were not provided by Respondent. Schultz told Byrne the Union were liars and back stabbers, and that Byrne would only work 6 months out of the year. Schultz told Byrne there was no place for a union in his shop.<sup>54</sup> Later on Egan came into the parking lot and asked Byrne if he was going to show up for work tomorrow. Byrne asked why he would not and Egan replied, "Well this whole Union thing."

On June 21, Byrne distributed union pamphlets to his co-workers during their lunch break. When Byrne tried to tender one to Egan, Egan responded that he would "fuckin burn it." Schultz was informed of Byrne's distribution of union literature during lunch that day. At the end of the day on June 21, the employees were given a new written work rule with their paychecks. The rule prohibited "organization documentation" from being left at Respondent's jobsites and its facility, and limited the distribution of these documents to the employees' ½ hour lunch. Schultz admitted that Byrne's union activity prompted him to adopt the rule. I found that the rule was unlawfully broad, discriminatory on its face, and in view of its adoption and maintenance in response to Byrne's union activities it was violative of Section 8(a)(1) of the Act.

On June 24, Byrne wore a shirt to work with a small Local 269 logo on it. This attracted the attention of Shipwash, the foreman of the jobsite general contractor, and Egan. Egan approached Byrne and told him that Shipwash asked why he was wearing the shirt, and that Byrne was supposed to be wearing Respondent's shirt. Byrne told Egan Respondent's handbook said he had to wear jeans, a t-shirt, and boots, which he was doing. Egan said Byrne could not wear a union shirt because it was a non-union job. Egan left and returned with Shipwash. During the conversation that ensued Shipwash asked Byrne if he was in the Union and told Byrne he was not allowed to wear those types of shirts on these jobs and that he had 5 minutes to turn the shirt inside out

<sup>53</sup> For reasons set forth above, I do not credit Egan or Schultz' claims that these conversations were disruptive of employees' work.

<sup>&</sup>lt;sup>54</sup> While these remarks were not alleged as unfair labor practices in the complaint, I still find they constitute evidence of animus toward union activities. See *Stoody Co.*, 312 NLRB 1175, 1182 (1993); and *Meritor Automotive*, *Inc.*, 328 NLRB 813, 183 (1990).

<sup>&</sup>lt;sup>55</sup> While Byrne was wearing jeans, nothing was said to him about his failure to wear the pants that were also part of Respondent's uniform.

or be dismissed from the job. Egan followed Shipwash' comments by stating, "You heard the man." I found that Egan violated the Act by telling Byrne he could not wear a union shirt on the job and by his seconding Shipwash' instruction that Byrne turn shirt inside out. While Respondent had a uniform policy in its new handbook, neither Byrne nor Teeling were given a copy of the handbook, nor was the uniform policy enforced.

After he was instructed to turn his shirt inside out, Byrne phoned Aldrich on his cell phone, who directed him to comply with the order but to find out Shipwash name and the name of his employer. Byrne turned his shirt inside out and then entered C & C's trailer. Byrne asked Shipwash, in Egan's presence, for his name and the name of his employer. Shipwash said "Get out of here, you Union fuckin' scumbag." As he left the trailer, Byrne responded that he did not like Shipwash' remark. Shipwash, accompanied by Egan, ran after Byrne and when Shipwash caught up to him, he repeatedly asked what Byrne said. Egan also demanded that Byrne tell Shipwash what Byrne said.

A couple of minutes after noon, Byrne received a phone call from Aldrich, at which time he had a 5 minute discussion. After the conversation, Byrne went to get his lunch. He met Egan who said Byrne's 20 minute phone call and his 15 minute late arrival to work were going to be turned in.<sup>56</sup> Byrne responded he was only on the phone 5 minutes and it was during his lunch break.

On the afternoon of June 24, Byrne tendered five resumes to Schultz. Schultz said these were the same resumes that had recently been faxed to him as the Union had previously faxed them, among others, to Schultz. Schultz had sent them back to the Union stating they were not acceptable. Schultz told Byrne he did not want the resumes and threw them on a secretary's desk. Four of the five resumes Byrne tendered were from union officials.

During the course of June 24 and 25, Schultz authored a series of written verbal warnings on pre-printed forms for Byrne's file. Byrne was never given a copy of these documents nor told they were in his file. Four of the five warnings are dated June 24 and one is dated June 25. All the warnings state they were given on June 25. One of the June 24 warnings states Byrne showed up 15 minutes late for work; the next states he wore a "non appropriate company uniform"; the next states he used his "personal phone during work hours, on phone for 15 minutes while supposed to be working"; and the final June 24 warning states Byrne, "went into customer job trailer and demanded their name and phone # after was asked to turn shirt inside out. Was told to leave then said He' not going to like this." The June 25 written verbal warning reads, "Kevin was told by Walt E on 6/24/02 to wear company uniform. Kevin did not wear his shirt. I told him he needed to wear uniform & reread his co policy/ he was arguing with me about it."

Based on Byrne's credited testimony: On the morning of June 25, Schultz came to the Harlan House jobsite and told Byrne he was informed of Byrne's 20 minute phone call, about Byrne's being late, and about him not wearing a company uniform the day before. Schultz told Byrne he had to wear a company uniform. Schultz ignored Byrne's request to see something in writing stating that was the uniform policy. Yet, Byrne correctly protested that under the only handbook Byrne had been given, he was in compliance with Respondent's dress code, which only required he wear jeans, a t-shirt

<sup>56</sup> Byrne and Teeling commuted together to the site and were 15 minutes late.

and boots, with no limitation placed on the type of t-shirt. Schultz told Byrne this was an oral warning.

I find that the General Counsel has made a prima facie case under the Board's Wright Line decision that the June 24 and 25 written verbal warnings and oral warning Schultz issued to Byrne on June 25 were violative of the Act. Schultz and Egan were aware of Byrne's union activity, and by their conduct and statements, including several independent violations of Section 8(a)(1) of the Act, demonstrated strong animus towards that activity. I also find that the warnings issued to Byrne were a direct result of his participation in protected conduct.

The June 24 and 25 written verbal warnings for Byrne being out of uniform came as a direct result of Byrne wearing a union t-shirt on June 24. As set forth above, Respondent's uniform policy was not routinely enforced, and both Schultz and Egan had seen Byrne out of uniform prior to June 24 without comment. It was only after he wore a union t-shirt that they reacted. Accordingly, I find that Schultz' written and oral warnings to Byrne for being out of uniform were discriminatorily motivated and violative of Section 8(a)(1) and (3) of the Act. See *E & L Transport Co.*, 331 NLRB 640, 640 (2000), where the enforcement of an invalid rule pertaining to the wearing of union stickers was found to violate Section 8(a)(1) and (3) of the Act. <sup>57</sup>

I find that Schultz' June 24, written verbal warning to Byrne for entering C & C's trailer is violative of Section 8(a)(1) and (3) of the Act. Byrne's action in entering the trailer was part of his union activity. For after Shipwash and Egan had unlawfully instructed Byrne to turn his union shirt inside out, Union Organizer Aldrich told Byrne to comply but to find out Shipwash' name and the name of his employer. Byrne did so by entering the trailer and posing those questions to Shipwash. Shipwash responded by stating, "Get out of here, you Union fuckin' scumbag." As he left the trailer, Byrne responded that he did not like Shipwash' remark. I do not credit Egan's testimony that Byrne burst into the trailer, or addressed Shipwash in a rude manner. In this regard, Egan and Schultz falsely attempted to color the incident by claiming Byrne requested personal information from Shipwash, and I found Byrne made no such request. Byrne was clearly attempting to procure employment related information from Shipwash to

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<sup>&</sup>lt;sup>57</sup> Similarly, I find a written oral warning Schultz placed in Teeling's file for being out of uniform on June 25, although not alleged in the complaint, is violative of Section 8(a)(1) and (3) of the Act. The warning reads, "Bob was in location and heard Walt E telling Kevin B. about company uniforms. Then showed up the next day without co. shirt." Teeling was not told he was receiving a warning, or that a warning was being placed in his file. Teeling's warning is closely related to conduct alleged to be unlawful in the complaint, and it was fully litigated at the hearing as it was placed into evidence by Respondent as part of its defense for the warning it issued to Byrne for similar conduct. (R. Exh. 16). See D & F Industries, Inc., 339 NLRB No. 73, slip op at 3, fn. 13 (2003); and Cardinal Home Products, Inc., 338 NLRB No. 154, slip op at 3-4 (2003), where violations were found for conduct not alleged in a complaint. I find that Teeling's June 25, warning for being out of uniform came as a result of a clamp down because of Byrne's wearing a union shirt on June 24, therefore was the direct result of Byrne's union activity. The fact that Teeling was not active in the union does not prevent a finding that he was discriminated against because of the union activity of another employee. See Link Mfg. Co., 281 NLRB 294, 299, fn. 8 (1986), enfd. 840 F.2d 17 (6th Cir. 1988), cert. denied 488 U.S. 854 (1988).

perfect the filing of an unfair labor practice charge pertaining to C & C and Respondent because of their unlawful attempt to restrict his union activity. In fact, Schultz's June 24 notes reflect "Kevin called BA then turned shirt inside right. Then Kevin went into C & C job trailer. Demanding Tim S. to give him name & Phone # of Company." I do not find that Byrne acted in a manner in requesting this information that would remove his conduct from the Act's protection. Moreover, the Board has long held that an employer cannot provoke an employee because of his participation in protected activity to the point where the employee commits acts of misconduct, and then rely on such acts to discipline the employee. See, *Indian Hills Care Center*, 321 NLRB 144, 152, 154-155 (1996); *Romar Refuse Removal*, 314 NLRB 658, 671 (1994); *Teskid Aluminum Foundry*, 311 NLEB 711, 720 (1993); 299 Lincoln Street, Inc., 292 NLRB 172, 203 (1988), *Tubari Ltd.*, 287 NLRB 1273, 1285 (1988) enfd. 869 F.2d 590 (3d Cir. 1989); *Well-Bred Loaf*, Inc., 280 NLRB 306, 319, fn. 51 (1986); *NLRB v. Vought Co.*, 788 F.2d 1378, 1383-84 (8th Cir. 1986); *NLRB v. Steinerfilm*, 669 Fd. 845, 852 (1st Cir. 1982); and *NLRB v. M&B Headwear*, 349 F.2d 170, 174 (4th Cir. 1965).

Byrne was on his cell phone after receiving a call from Aldrich for about 5 minutes on June 24, during the course of his noon lunch break. Following this phone call. Egan falsely accused Byrne of being on the phone for 20 minutes, and during the same conversation he told Byrne that Egan was going to report the phone call as well as Byrne's 15 minute late arrival to work that day to Schultz. When Schultz arrived at the jobsite on the morning of June 25, he told him Byrne he was giving him a warning, in part for his 20 minute phone call and late arrival to work the day before. Schultz made two references to this phone call in his daily log concerning Byrne. One reference states, "Kevin Byrne -6/24/02 calling labor board. 12:20 returned for lunch. 11:50 -12:15 on phone. Sat for 10 min then ate lunch." Schultz' other reference in his notes to Byrne's phone activity on June 24, was that Egan saw Byrne on the phone from 11: 50 a.m. to 12:18, during which time Byrne was talking to a "union person." At the time, he made these notes concerning Byrne's phone call, Schultz was aware that Byrne had been instructed by Shipwash and Egan to turn his union shirt inside out in order for Byrne to remain on the job. Schultz was also aware that Byrne had come into C & C's trailer and asked Shipwash information relating to his employer with likelihood that this information was being solicited for the filing of an unfair labor practice charge since Aldrich had recently sent Schultz a letter informing him that Byrne was engaged in "organizing activities protected by the National Labor Relations Act." I find that Schultz was aware that Byrne's phone call on June 24, was in furtherance of his union activities and that Schultz violated Section 8(a)(1) and (3) of the Act by issuing a written verbal warning for Byrne's file on June 24, and verbally warning Byrne on June 25 for engaging in this protected conduct since I have credited Byrne and Teeling that the phone call Byrne made was only 5 minutes and during his lunch break.

Moreover, even assuming that I were to find that the phone call began 10 minutes before the start of the noon lunch break, Respondent's handbook only prohibited "excessive personal phone calls." I have concluded that this policy was not regularly enforced as Egan, a foreman of 10 years, testified that Respondent's policy prohibited all personal phone calls. Egan's lack of familiarity with Respondent's regulations confirms Teeling's testimony and my other findings at the hearing that Respondent attempted to implement new regulations and tighten the enforcement of others as a result of Byrne's union activity.<sup>58</sup>

<sup>58</sup> Respondent tendered one verbal written warning for an employee being on "the

I also find that Schultz violated Section 8(a)(1) and (3) of the Act for issuing written verbal warnings to Byrne and Teeling and an oral warning to Byrne for showing up late 15 minutes late on June 25. Egan told Byrne he was reporting Byrne's tardiness in the same breath as he told him he was reporting Byrne's phone call to the Union. Byrne had shown up an hour late on June 17, when he reported to the wrong jobsite, yet nothing was placed in Byrne's file over this incident, which took place before Respondent was informed Byrne was a union organizer. Thus, Respondent has not met its burden of showing that it had a fixed tardiness policy or that it would have written either Byrne or Teeling up for being 15 minutes late on June 24, absent an intent to tighten the enforcement of its rules to go after Byrne because of his union activities.<sup>59</sup>

I find the General Counsel has made a prima facie case that Byrne's June 25, discharge was motivated by his union activity. After leaving the jobsite the morning of June 25, Schultz returned around 12:30 p.m. that day. The credited testimony establishes that Schultz, accompanied by Shipwash and Egan, told Byrne that he had talked to three construction workers who said Byrne was talking to them about the Union on company time. Schultz told Byrne he was firing him for talking about the Union on company time and Byrne said he could not fire him for that. Schultz also told Byrne that Byrne had been bad-mouthing Respondent. Byrne then made a phone call and said he had been fired for talking about the Union and that he had some NLRB charges to file. Following the phone call Byrne told Schultz he was making a mistake, and that Byrne had gotten what he wanted. Byrne told Schultz he was only hurting himself by firing him.

Schultz' testimony reveals that the precipitating event causing him to discharge Byrne was, after warning Byrne that morning; Schultz received a call from Egan. Schultz notes of the call reveal that, Egan told him "that the General Contractor C & C Construction's foreman Tim Shipwash told him that Kevin was putting J & S Electric down and promoting the Union to his men and the excavator during work hours." As a result, Schultz returned to the jobsite, and asked Shipwash to meet with two C & C laborers and the excavator employee. Upon meeting with these employees Schultz was told, as reflected in his June 25 notes, that Byrne announced he was a union organizer trying to get Respondent to go union, asked them if their company was union,

phone too much making personal calls on company time." (R. Exh. 17). The memo by its terms establishes the employee in question was making multiple calls and does not support Respondent's position that Byrne would have been disciplined here for one phone call, absent his participation in union activity.

<sup>59</sup> While there was no complaint allegation concerning Teeling's written verbal warning for being late on June 24, Teeling was never told he was receiving this warning. I have concluded that the warning was closely related to the complaint allegations in that it was an outgrowth of the discriminatory conduct towards Byrne and was fully litigated as Respondent introduced it into evidence as part of its defense to the unfair labor practice complaint. (R. Exh. 32). See *D & F Industries, Inc.*, supra, slip op at 3, fn. 13 (2003); *Cardinal Home Products, Inc.*, supra, slip op at 3-4 (2003); and *Link Mfg. Co.*, supra, at 299, fn. 8.

<sup>60</sup> I do not credit Schultz' testimony at the hearing that Egan reported to him that Byrne was disrupting the jobsite. I found Schultz to be prone to exaggeration.

<sup>61</sup> Schultz states in his affidavit that when he met with Shipwash, Shipwash merely told him "Byrne was talking about the Union to other trades." Shipwash then named three employees.

and told them they should go union. Schultz notes reflect that Byrne said Respondent was too cheap to buy a job trailer, that he was the union representative and things were going to change around there.<sup>62</sup> It is stated in Schultz' notes that while talking to the two C & C laborers Byrne received a phone call from a union representative, showed them the phone screen, said it was his boss, and then started talking on the phone.<sup>63</sup>

I find that Schultz, Egan, and Shipwash harbored strong animus to Byrne's union activity for the reasons set forth above. I have credited Byrne, as corroborated in part by Teeling, that Schultz told him he was fired for talking about the Union on company time. I do not credit Schultz' uncorroborated claim that Byrne disrupted the work of C & C's employees or the excavator or that he in any way harassed anyone. Byrne's assignment on June 25, included taking materials from Respondent's storage room at the site, and loading it into Respondent's trailer. Schultz' testimony reveals that the C & C laborers were loading a trailer just 20 feet away from the trailer Byrne was loading. Schultz testimony reveals that the excavator was working just 10 feet away from Byrne on June 24. Schultz and Egan testified that employees would frequently converse about non-work topics while working without objection from Respondent, and Egan testified he ioined in these conversations. Schultz also testified he was aware of no rule at the site prohibiting his employees from talking to the employees of other contractors. Yet, shortly after it was announced that Byrne was a union organizer Schultz adopted a discriminatory rule prohibiting employees from discussing the Union, while they were allowed to continue to discuss other non work topics while working.

62 I reject the counsel for the General Counsel's motion at page 36, footnote 1 of their post-hearing brief to amend the complaint to allege Schultz' questioning of C & C employees Kish and Richards and excavator employee Ruth about their conversations with Byrne violated Section 8(a)(1) of the Act. It is unexplained in counsel's motion why they waited until their post hearing brief dated April 7, 2003, to make this motion when Schultz stated in his pre-hearing affidavit of September 2, 2002, to the Region that he engaged in this conduct. Moreover, there is no contention in General Counsel's brief that Respondent was ever placed on notice of their intent to move to amend the complaint. Schultz questioned these employees after receiving a complaint from the general contractor about Byrne's conduct at the jobsite. An argument can be made that in questioning these employees Schultz was trying to investigate the complaint. In fact, at one point in their brief counsel for the General Counsel argue that Schultz' failure to adequately investigate allegations against Byrne evidences a discriminatory intent. I do not find Schultz' questioning of these employees is based on the same legal theory as the complaint allegations leading up to Byrne's discharge, that Respondent was put on notice of the claim, or that it has been fully litigated.

<sup>63</sup> Byrne testified generally that he did not have any conversations with other trades. However, he was never specifically asked whether he spoke to the C & C laborers or the excavator who worked in close proximity to Byrne. Noting that Schultz' testimony about these conversations is hearsay, I nevertheless find that Byrne did talk to these employees, and it was reported to Schultz as set forth above. In this regard, Schultz documented the conversations in his notes, and credibly testified he returned to the jobsite on June 25 as a result of these conversations. However, I do not credit Schultz' uncorroborated claims that Byrne bothered these employees or disrupted their work. I found that Schultz was prone to exaggeration. Moreover, Schultz testified in his affidavit that the excavator told Schultz that he gave Byrne his phone number for Byrne to call him about the Union a strong indication that the employee was not upset by Byrne's conversing with him.

I have concluded that Respondent has failed to establish that Byrne's conversation with the C & C employees and the excavator about the union disrupted their work or was in any way different from non work related conversations between employees that were carried on a daily basis. Rather, I find it was the substance of the conversation, not how it impacted on work performance, that Respondent's officials and Shipwash found objectionable. I also find that Byrne's informing these employees that Respondent was too cheap to have a job trailer and that things would change around there as a result of his union activities was part of his protected conduct as access to a trailer at the jobsite and whatever amenities it would provide to employees clearly related to their terms and conditions of employment.<sup>64</sup> Since I have concluded for the reasons set forth above that the warnings Schultz prepared for Byrne on June 24 and 25 were unlawfully motivated, I do not find that they serve to aid Respondent in rebutting the General Counsel's prima facie case that Byrne was unlawfully discharged.

Similarly, I do not find persuasive Schultz' attempts to cite Byrne's attendance and job performance in support of his discharge. Schultz, although he mentioned these matters in his pre-hearing affidavit, did not cite them as a reason for discharging Byrne in his affidavit, nor did he mention them to Byrne when he fired him. Rather, he told Byrne he was being discharged for talking about the union on company time. In support of his claims of poor job performance. Schultz cited a memo he claimed to be written by Sadler, Byrne's foreman at his prior jobsite, which contained several alleged performance related problems by Byrne. However, Sadler was not called to testify and Byrne only admitted to some of the items described in the memo, but denied others including a representation that it was a consistent problem that Sadler had to repeat himself on the simple instructions to Byrne, sometimes 5 to 8 times a day. Given the fact that Byrne was transferred to another jobsite following his stint with Sadler, and that Foreman Jablanofsky had previously worked with Byrne with no problem with his work. I find some of the representations in the Sadler's memo suspect and do not credit them except to the extent they were admitted by Byrne. Byrne, an apprentice, also admitted to making a mistake at the Harlan House jobsite in terms of drilling some holes for the placement of receptacles. However, he testified that Foreman Rueth told him not to worry about it and that it was easily correctible. In any event, I do not credit Schultz' claim at the hearing that Byrne's discharge was caused by his work performance or attendance, since that claim is undercut by the testimony in his affidavit, and the events that lead Schultz to return to the jobsite on June 25 to discharge Byrne.

I also reject Respondent's argument in its post-hearing brief that Byrne, unhappy with his transfer away from his home, orchestrated the discharge to secure a better paying union job. While Byrne told Schultz that he got was he wanted, he also protested the discharge and told Schultz that he was making a mistake in firing him. I do not view Byrne's remarks that he got what he wanted as anything more than statements of an

<sup>&</sup>lt;sup>64</sup> Byrne made this remark in the context of an ongoing labor dispute and he did not disparage the quality of Respondent's product. Byrne's remarks were not of the nature that would remove his conduct from the Act's safeguards. See, *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1241 (2000); *Cincinnati Suburban Press*, 289 NLRB 966, 967-968 (1988); and *Emarco, Inc.*, 284 NLRB 832, 833 (1987). Moreover, I have concluded that Respondent's animus was directed towards Byrne's union activities, and that he would not have been discharged for a complaint to employees that Respondent did not have a job trailer, absent his participation in protected union activities.

aggrieved employee who had just been unlawfully discharged and otherwise discriminated against attempting to strike back at the perpetrator of the unlawful conduct. Moreover, based on the credited evidence, I have concluded that it was Respondent that orchestrated the unfair labor practices against Byrne, as opposed to any scheme that Byrne brought to fruition by his own conduct. Accordingly, Respondent has not rebutted the General Counsel's prima facia case and I find that Byrne was discharged because of his union activity in violation of Section 8(a)(1) and (3) of the Act.<sup>65</sup>

## 2. Refusal to consider for hire

In *Wayne Erecting, Inc.*, 333 NLRB 1212, 1212 (2001), the Board, citing *FES*. 331 NLRB 9 (2000), stated the following for refusal-to-consider for hire allegations:

In order to establish a discriminatory refusal-to-consider violation under the FES framework, the General Counsel must show:

(1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicant for employment.

The Board went on to state that, "Once the General Counsel has met his initial burden for the refusal to consider...the burden shifts to the respondent to show that it would not have considered...the applicants even in the absence of their union activity or affiliation." Id at 1212. In *Nelson Electrical Contracting Corp.*, 332 NLRB 179, 180 (2000), enfd. 171 LRRM 2512 (2nd Cir. 2002), the Board rejected a respondent's defense that it chose to rely on transfers of its current employees from other projects, former employees, or "positive referrals from other sources," as sources for new hires where it departed from the policy when it advertised for employees, hired individuals who were not former employees, and hired without positive referrals.

Respondent maintains a two page undated typewritten document entitled "J & S Electrical Contractors, Inc. HIRING POLICY", which reads, in pertinent part that:

The Company does not accept applications from "walk-ins", or by unsolicited fax or mail delivery.

The Company will only accept applications from:

An applicant whose character, reputation and/or experience is personally known to the owner(s); or

An applicant who is referred by a current employee. The referring employee must know the applicant personally and be personally familiar with his/her character, reputation, skills, ability and/or experience. The

<sup>&</sup>lt;sup>65</sup> While Schultz' notes and affidavit reveal that a C & C official directed Schultz to remove Byrne from the jobsite, Schultz did not testify at the hearing that this instruction had anything to do with his firing Byrne, nor did Respondent raise this as a defense. Even if Respondent had raised this as a defense, I would have rejected it. Schultz notes and affidavit establish Schultz was aware C & C's directive came as a result of Byrne's protected union activities. Respondent has failed to establish it protested the directive, or that it could not have placed Byrne at another jobsite as Schultz testified that he had five or six jobsites with 30 employees at the time. Moreover, I find that regardless of any directive from C & C, Respondent was motivated by its own animus towards Byrne's union activities, which independently caused Schultz to discharge Byrne.

referring employee must give the name and phone number so we may contact the referral if we are hiring at that time. No dropping of resumes will be accepted.

The typewritten hiring policy also provides that preference will be given to, "Applicants whose skills and ability and/or work experience are personally known to the owner(s) or the referring employee." 66

Schultz testified at the hearing that Respondent accepted walk-ins in 2002 until around the end of March or beginning of April, when its written hiring policy changed to the one set forth above. Schultz testified that, prior to that time, an applicant did not need to know the owner or a current employee in order to be hired. However, in Schultz pre-hearing affidavit, he testified it was in January or February 2002 that the hiring policy changed and that before that time Respondent accepted walk-ins.

Byrne applied for work at Respondent on February 5, and interviewed with Schultz and Batzel. While there was a sign on Respondent's front door on February 5 stating not hiring walk-ins, Byrne was hired on March 25, although he knew no one employed by Respondent at the time he applied.

Byrne referred Gene Kehoe for employment with Respondent. Kehoe applied for work on April 1, and was hired on May 7. Byrne spoke to Batzel about Kehoe. Batzel asked Byrne how he knew Kehoe. Byrne told Batzel he had never worked with Kehoe and that he knew Kehoe through Kehoe's father. Batzel did not ask Byrne anything about Kehoe's character and reputation.<sup>67</sup> Kehoe was discharged on May 28, for failing to show up for work. Schultz initially testified that he did not know anyone referred Kehoe, and that he thought Kehoe was a walk-in.

Some time toward the end of May, Local 269 Organizer Tom Bates contacted Schultz about Respondent becoming a union shop. Schultz met Bates and Organizer Aldrich for dinner, but informed them he was not interested in becoming a union shop.

Thomas Nelson's application is dated April 5, and he was hired May 20. Schultz did not know if anyone referred him for employment. Brian Naticchione's application is date June 3. Schultz testified a former employee who left Respondent's employ in 1999 referred him. 68 Dan Seymour's application is dated July 15 and he was hired August 19. Neither an owner nor a current employee referred him. Rather, Larry Leary who worked for another contractor referred him. Shawn Johannessen's application is dated September 10, and he was hired September 16. Schultz testified a personal friend rather than a current employee referred him. Timothy Leary's application is dated October 15, although Respondent's records reveal he was hired October 5. Schultz testified that Larry Leary also referred Timothy Leary.

<sup>&</sup>lt;sup>66</sup> There was no evidence in the record that this policy had been distributed to Respondent's employees.

<sup>&</sup>lt;sup>67</sup> Byrne at first testified that he spoke to Schultz about Kehoe's application, but then credibly corrected his testimony and said he spoke to Batzel not Schultz. Byrne's testimony as to his conversation with Batzel is undenied, as Batzel did not testify.

<sup>&</sup>lt;sup>68</sup> While Naticchione's name was omitted from a list of individuals Respondent employed, the import of Schultz' testimony was that he was hired in 2002.

Schultz testified, as set forth in his affidavit, that in May he announced to employees during a company meeting that Respondent was hiring, and as stated in his affidavit, "they could refer any qualified people they knew." On June 20, Bates faxed Schultz 12 resumes including those of alleged discriminatees Bates, Aldrich, Andra, Hnatkowsky, and Huston. Bates faxed Schultz an additional set of about 12 resumes on June 21. Schultz returned all of the resumes by letter dated June 21, and informed Bates that, "It is not our company policy to accept any applications via fax, phone, walkins or mail. Therefore, none of these applications will be accepted...".

Byrne's credited testimony reveals that following work on June 24, Byrne entered the office and told Schultz he had some resumes for him. Byrne showed him Bates, Aldrich, Andra, Hnatkowsky, and Huston's resumes, and Schultz said these are the same ones that were just faxed to him. Byrne replied that Schultz sent a reply stating he only accepted resumes through personal referrals, so Byrne was giving them to Schultz. Schultz did not ask Byrne any questions; he just looked at the resumes and said, "I don't want these," and threw them on a secretary's desk.

I find that the General Counsel has established a prima facie case that Respondent refused to consider Bates, Aldrich, Andra, Hnatkowsky, and Huston applications as a result of their union affiliation. That Respondent harbored strong animus towards employees union activities is clear on this record by the numerous violations of the Act it committed, including Schultz informing Byrne that he did not want to hire union members. Schultz was also aware that Byrne was a voluntary union organizer at the time he tendered the resumes and that Byrne was tendering resumes of union adherents by Schultz' remarks that these resumes had previously been faxed to him. The resumes on their face also establish the applicant's union status and Schultz admitted to seeing Bates' resume.

I find that Respondent has failed to meet its burden of establishing that it would not have considered these applicants absent their union activity. Schultz testimony at the hearing along with that contained in his affidavit, reveals that he did not know when Respondent adopted its alleged hiring policy of only accepting applicants referred by current employees or known to the owner. It is stated in his affidavit that the policy was adopted in January or February. Lending credence to the affidavit is Byrne's credited testimony that when he applied on February 5, there was a sign on Respondent's office stating not accepting walk-ins. Nevertheless, Respondent not knowing Byrne was sent by the Union, violated its own posting and hired him although he was not referred by a current employee or known to the owner. Respondent's records and Schultz testimony reveal that after the implementation of Respondent's hiring policy it hired five applicants in violation of the policy in that they were not personally known to the owner or referred by a current employee. Byrne's testimony reveals that Batzel hired Kehoe on May 7, based on Byrne's referral, although Byrne told him that he had never worked with Kehoe. Moreover, Schultz did not object to Kehoe's hiring, although he initially testified that he thought Kehoe was a walk-in. (Tr. 37).

Respondent argues at page 45 of its brief that:

...J & S clearly satisfied its burden of demonstrating it would not have considered the individuals whose resumes Byrne handed to Schultz even in the absence of their union activity or affiliation due to the disruptive conduct engaged in by Byrne on the day he offered the resumes to Schultz and the fact that the one person

Byrne previously referred for employment had never showed up for work and ultimately abandoned his job after working for J & S for less that three (3) weeks.

I reject these contentions. I find that what Respondent labels as disruptive conduct by Byrne on June 24, was his engaging in protected union activity, for which Respondent discriminated against him in violation of Section 8(a)(1) and (3) of the Act. Respondent is referring to Kehoe when it contends Byrne referred an employee who abandoned his iob. However, Schultz initially testified that he did not know anyone referred Kehoe that he thought he was a walk-in. Schultz subsequently changed his testimony after hearing Byrne testify that he referred Kehoe for employment. Schultz then claimed that Byrne's referral of Kehoe who did not work out at Respondent was part of the reason he refused to accept the applications Byrne tendered on June 24, 2002. I do not credit Schultz' contention that he refused to accept the resumes of the union applicants because Kehoe had not worked out as an employee, as I have concluded that he did not know Byrne referred Kehoe until after Byrne testified at the trial in January 2003. Moreover, Respondent's raising this argument demonstrates the pretextual nature of its position.<sup>69</sup> Accordingly, I find Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider Bates, Aldrich, Andra, Hnatkowsky, and Huston for employment since Respondent harbored strong union animus, and did not enforce its typewritten hiring policy, which it in relied on to reject their applications. See, Nelson Electrical Contracting Corp., supra.

## CONCLUSIONS OF LAW

- 1. J & S Electrical Contractors, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. International Brotherhood of Electrical Workers, Local Union No. 269, AFL-CIO, the Union is a labor organization within the meaning of Section 2(5) of the Act.
  - 3. Respondent violated Section 8(a)(1) of the Act:
- (a) By maintaining a rule requiring employees to keep their salaries confidential and that the discussion of salaries would lead to immediate termination.
- (b) By informing employees that Respondent did want to hire applicants affiliated with the Union.
- (c) By promulgating and enforcing a discriminatory no-solicitation rule prohibiting employees from talking about the Union during work time, while allowing other nonwork-related discussions by employees because its employees engaged in union activity.
- (d) By promulgating and enforcing a discriminatory and overly broad nodistribution rule prohibiting employees from leaving "organization documents" at job sites and the shop, while not restricting the distribution of other non-work related documents, and by limiting the distribution of "organization documents" to employees' lunch break because its employees engaged in union activity.
- (e) By informing employees they could not hand out union literature or talk about the union at the job or distribute union literature during their lunch break.
- (f) By discriminatorily enforcing work rules to prohibit employees from wearing union shirts, and instructing employees to turn their union shirts inside out.

<sup>69</sup> Respondent's reliance on *Exterior Systems, Inc.,* 338 NLRB No. 82 (2002), is misplaced. There, applicants there were rejected because they engaged in misconduct when they applied. There is no showing that any of the applicants here engaged in misconduct.

- 4. Respondent violated Section 8(a)(1) and (3) of the Act:
- (a) By since June 24, 2002, refusing to consider for hire applicants Steve Aldrich, Richard Andra, Tom Bates, Michael Hnatkowsky and James Huston because of their union affiliation.
- (b) By on or about June 24 and 25, 2002, issuing verbal written warnings and oral warnings to employee Kevin Byrne because of his union activities and in order to discourage other employees from engaging in union activities.
- (c) By on or about June 24 and 25, 2002, issuing verbal written warnings to employee Robert Teeling because employees engaged in union activities and in order to discourage other employees from engaging in union activities.
- (d) By on or about June 25, 2002, discharging employee Kevin Byrne because of his union activities and in order to discourage other employees from engaging in union activities.

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I have also found that Respondent discriminatorily refused to consider for hire five applicants whose resumes were tendered on June 24, 2002. Counsel for the General Counsel specifically stated at the hearing that there was no allegation that Respondent discriminatorily refused to hire these applicants. Yet, Counsel for the General Counsel also tendered into evidence an exhibit listing the names and positions for employees who were hired by Respondent after June 24, 2002, without contending that any of the alleged discriminatees should have been hired instead of the named employees. Accordingly, I exclude the discriminatees for consideration for employment in my recommended order for all positions hired on or after they applied that were known or should have been known to the General Counsel prior to the close of the unfair labor practice hearing on January 24, 2003. See *PNEU Electric*, 332 NLRB 616, 617 (2000), enfd. in relevant part 309 F.3d 843 (5th Cir. 2002).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>70</sup>

## ORDER

The Respondent, J & S Electrical Contractors, Inc., of Bensalem, Pennsylvania, its officers, agents, successors, and assigns, shall

<sup>&</sup>lt;sup>70</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 1. Cease and desist from
- (a) Maintaining a rule requiring employees to keep their salaries confidential and that the discussion of salaries will lead to immediate termination.
- (b) Informing employees that Respondent does not want to hire applicants affiliated with the Union.
- (c) Promulgating, maintaining, and enforcing a discriminatory no-solicitation rule, which prohibits employees from talking about the Union during work time, while allowing other nonwork-related discussions by employees, because its employees engage in union activity.
- (d) Promulgating, maintaining, and enforcing a discriminatory and overly broad no-distribution rule prohibiting employees from leaving "organization documents" at job sites and the shop, while not restricting the distribution of other non-work related documents, and by limiting the distribution of "organization documents" to employees' lunch break because its employees engage in union activity.
- (e) Informing employees they cannot hand out union literature or talk about the union on the job, or distribute union literature during their lunch break.
- (f) Discriminatorily enforcing work rules prohibiting employees from wearing union shirts, and instructing employees to turn their union shirts inside out.
- (g) Refusing to consider for employment applicants because of their union affiliation.
- (h) Issuing verbal written warnings, oral warnings, discharging or otherwise discriminating against employees because of their union activities, the union activities of other employees, or in order to discourage employees from engaging in union activities.
- (i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
  - 2. Take the following affirmative action to effectuate the policies of the Act.
  - a. Rescind the rule requiring employees to keep their salaries confidential.
- b. Within 14 dates from the date of this Order, delete from employee manuals which are distributed to new employees the rule that requires employees to keep their salaries confidential on penalty of discharge; and either distribute to current employees copies of the manual with this deletion, or make such deletion in the copies which they now possess.
- c. Within 14 days from the date of this Order, offer employee Kevin Byrne full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- d. Make Kevin Byrne whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.
- e. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and warnings to Kevin Byrne, and the unlawful warnings to Robert Teeling, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge and/or warnings will not be used against them in any way.
- f. Consider Steve Aldrich, Richard Andra, Tom Bates, Michael Hnatkowsky, and James Huston for future job openings in accord with nondiscriminatory criteria, and notify the Charging Party, International Brotherhood of Electrical Workers, Local No. 269, AFL-CIO, and the Regional Director for Region 4 of future openings in positions for which the discriminatees applied or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that Respondent but for the failure to consider Aldrich, Andra, Bates, Hnatkowsky, and Huston on June 24, 2002, would have selected

any of them for any job openings arising after the hearing closed on January 24, 2003, or for any job openings arising before the hearing closed that the General Counsel neither knew nor should have known had arisen, Respondent shall hire them for any such position and make them whole for any losses, in the manner set forth in the remedy section of this decision.

- g. Within 14 days from the date of this Order, notify Aldrich, Andra, Bates, Hnatkowsky, and Huston in writing that any future job application will be considered in a nondiscriminatory way.
- h. Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider for employment Aldrich, Andra, Bates, Hnatkowsky, and Huston, and within 3 days thereafter notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.
- i. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- j. Within 14 days after service by Region 4, post at its facility in Bensalem, Pennsylvania, copies of the attached notice marked "Appendix."<sup>71</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent on or after May 1, 2002.
- k. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

| Dated, Washington, D.C. | September 16, 2003 |                                       |
|-------------------------|--------------------|---------------------------------------|
|                         |                    |                                       |
|                         |                    | Eric M. Fine Administrative Law Judge |

<sup>&</sup>lt;sup>71</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United Stated Court of Appeals Enforcing and Order of the National Labor Relations Board."

#### APPENDIX

# NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT maintain a rule requiring employees to keep their salaries confidential and that the discussion of salaries will lead to termination.

WE WILL NOT inform employees that we do not want to hire applicants affiliated with the International Brotherhood of Electrical Workers, Local Union No. 269, AFL-CIO or any other union.

WE WILL NOT promulgate, maintain, or enforce a discriminatory no-solicitation rule, which prohibits employees from talking about the Union during worktime, while allowing other nonwork-related discussions by employees because our employees engage in union activity.

WE WILL NOT promulgate, maintain, or enforce a discriminatory and overly broad no-distribution rule prohibiting employees from leaving "organization documents" at job sites and the shop, and limiting the distribution of "organization documents" to employees' lunch break.

WE WILL NOT inform employees they cannot hand out union literature or talk about the union on the job, or distribute union literature during their lunch break.

WE WILL NOT discriminatorily enforce work rules to prohibit employees from wearing union shirts, or instruct employees to turn their union shirts inside out.

WE WILL NOT refuse to consider applicants for employment because of their union affiliation.

WE WILL NOT issuing verbal written warnings, oral warnings, discharge or otherwise discriminate against employees because of their union activities, the union activities of other employees, or in order to discourage employees from engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rule requiring employees to keep their salaries confidential.

WE WILL delete from employee manuals which are distributed to new employees the rule that requires employees to keep their salaries confidential on penalty of discharge; and either distribute to current employees copies of the manual with this deletion, or make such deletion in the copies which they now possess.

WE WILL within 14 days from the date of the Board's Order, offer employee Kevin Byrne full reinstatement to his former position or, if that position no longer exist, to

a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Kevin Byrne whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the Board's decision.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings to Kevin Byrne and Robert Teeling, and to the unlawful discharge of Kevin Byrne, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge and/or warnings will not be used against them in any way.

WE WILL consider Steve Aldrich, Richard Andra, Tom Bates, Michael Hnatkowsky, and James Huston for future job openings in accord with nondiscriminatory criteria, and notify them, Charging Party International Brotherhood of Electrical Workers, Local No. 269, AFL-CIO, and the Regional Director for Region 4 of future openings in positions for which they applied or substantially equivalent positions. If it is shown at a compliance stage of the Board's proceeding that but for the failure to consider them, they would have been selected for any other openings as specified in the Remedy section of the Board's decision, we shall hire them for any such position and make them whole, with interest for any losses of earnings and benefits.

WE WILL, within 14 days from the date of Board's Order, notify Aldrich, Andra, Bates, Hnatkowsky, and Huston in writing that any future job application will be considered in a nondiscriminatory way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider for employment Aldrich, Andra, Bates, Hnatkowsky, and Huston, and within 3 days thereafter notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

|       | _  | J & S ELECTRICAL CONTRACTORS, INC. |         |
|-------|----|------------------------------------|---------|
|       |    | (Employer)                         |         |
| Dated | Ву |                                    |         |
|       |    | (Representative)                   | (Title) |

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

615 Chestnut Street, One Independence Mall, 7th Floor, Philadelphia, PA 19106-4404

(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

## THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUSTNOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-7643.